TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 622.

W. S. TYLER COMPANY, PETITIONER,

vs.

LUDLOW-SAYLOR WIRE COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED SEPTEMBER 14, 1914.

(24,366)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1914.

a United States Circuit Court of Appeals for the Second Circuit.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant-Appellant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant-Appellee.

Transcript of Record.

Appeal from the District Court of the United States for the Southern District of New York.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1913. William Parkin, Clerk.

1 United States Circuit Court of Appeals, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States in and for the Southern District of New York:

The W. S. Tyler Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio and a citizen of said State, having its principal office and place of business at Cleveland, Ohio, Complainant, brings this its bill of complaint against The Ludlow-Saylor Wire Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri and a citizen of said State, and having a regular and established office and place of business at No. 30 Church Street,
2 Borough of Manhattan, City of New York, in the Southern District of New York, where some of the acts of *acts of* infringement complained of were committed, defendant.

Thereupon your orator complains and says:

1. That your orator is engaged in the manufacture and sale of wire fabrics of various sorts, including Fourdrinier belts, wire cloth, screens and the like, at Cleveland, in the State of Ohio, where it maintains an office and factory, and that it has been so engaged for the period of about forty (40) years last past. The products of your orator's said factory have been sold in large quantities throughout the United States and elsewhere and your orator has acquired an

extended trade in said goods and has established a large and profitable business therein and all of its said products, including the wire screens hereinafter more particularly referred to, have become known throughout this country to the trade and public; that your orator has established and now maintains branch offices and places of business and has numerous agents in various cities in the United States and that by reason of the energetic and vigorous prosecution and development of its business through advertising and the personal efforts of its numerous agents who solicit the retail trade throughout the United States, and also by reason of the careful attention which your orator has given to the quality and workmanship of its various products and the superior character thereof your orator has acquired and now enjoys a recognized and enviable reputation throughout the United States for the excellence of its goods and for the fairness and uniformity of its methods of doing business.

3 2. That prior to the 27th day of May, 1907, one Morley P. Reynolds was the first and original inventor of a certain new and useful improvement in woven wire fabric for screens not known or used before his said invention thereof nor patented nor described in any printed publication in this or any foreign country before said invention, and not abandoned, nor in public use or on sale in the United States or patented or described in any printed publication in any country for more than two (2) years prior to the date of the application for a patent in the United States as hereinafter mentioned and for which no application for Letters-Patent was filed by the said Morley P. Reynolds or his legal representatives or assigns in any country more than seven months prior to his application, and being so as aforesaid the original and first inventor and entitled to make application for and receive Letters-Patent of the United States therefor, the said Morley P. Reynolds did on the 27th day of May, 1907, make application for Letters-Patent of the United States, in accordance with the then existing laws of Congress, and having duly complied in all respects with the requirements of said laws and having by an assignment in writing dated June 6, 1910, duly executed and delivered and afterwards recorded in the United States Patent Office, transferred his entire right, title and interest in and to said application and the invention thereunder to your orator and requested the Commissioner of Patents to issue the said Letters-Patent to your orator. Letters-Patent of the United States No. 966,599, under seal of the Patent Office and signed by the Commissioner of Patents, were in due form of law on the 9th day of August,

1910 issued to your orator for said invention, whereby there

4 was secured to your orator, its successors and assigns, for the full term of seventeen (17) years from the said 9th day of August, 1910, the full and exclusive right to make, use and vend to others to be used the said improvement as by the said original Letters-Patent, or a duly certified copy thereof here in Court ready to be produced if required, will more fully appear. A printed Patent Office copy of said Letters-Patent is hereto attached marked "Exhibit A."

3. That by virtue of the premises your orator became on the date

of said assignment the sole and exclusive owner of said invention or improvement in screens and ever since said 9th day of August, 1910 has been the sole and exclusive owner of the said Letters-Patent therefor and possessed of the exclusive right and privilege of making, using and vending to others to be used the improved screens described and claimed in the said Letters-Patent and that your orator has granted no licenses thereunder.

4. That during the latter part of the year 1905 or early in the year 1906 your orator began the manufacture of said patented screens and has ever since that time made the same continuously in large numbers and has built up and established a large and profitable trade thereunder; that your orator has used good materials and workmanship in the manufacture of the said screens and for the purpose of identifying the same as of your orator's manufacture devised and adopted certain marks and identifications, to wit, a square sheet-metal tag or plate which was attached to each of the said screens when shipped from your orator's factory and which tags have from the beginning contained certain words and certain pe-
5 culiar marks, all arranged in a particular manner so as to identify the said screens as of your orator's manufacture; that as first used the said sheet-metal tags contained the words "Pat. App. For" in addition to certain other marks and designations; that before and after the issuance of your orator's patent your orator continued the use of the said sheet-metal plates or tags and affixed one thereof to each of the screens manufactured under said invention and Letters-Patent; that as so used each of said metal tags has the name of your orator, "The W. S. Tyler Company," the words "Cleveland, Ohio" and the words "Ton-Cap Screen" arranged in horizontal curved lines enclosing a representation of a section of said screen and a raised panel to contain the number of said screen, and after the issue of said Letters-Patent the tag was marked with the number of said patent; that the said tag or plate with the lettering aforesaid and the particular arrangement thereof was of distinctive appearance and was adopted and became known in the trade as your orator's mark by which its goods were identified and that said goods so made and sold under said mark or identification became known and recognized as indicating screens of superior excellence and as made by your orator.

5. That ever since the issuance of the said Letters-Patent your orator has marked the screens made by it under the said Letters Patent No. 966,599 as required by law and thereby has given out notice to the public that the said screens were patented and that the defendant herein has also been specially and particularly notified of the said Letters-Patent and of your orator's exclusive rights thereunder and requested to desist from infringement thereof as hereinafter complained of.

6 6. That the public generally has recognized the exclusive rights of your orator in the premises not only by the purchase of said patented screens in large numbers from your orator but also by refraining from infringement upon your orator's said exclusive rights and that but for the infringement of the defendant as herein

after referred to your orator would be in the undisturbed possession and enjoyment of said exclusive rights; no other person, firm or corporation having infringed thereon save one.

7. That the said defendant, well knowing the premises and all the facts hereinbefore set forth, since the issuance of the said Letters Patent and the marketing of the screens made thereunder by your orators marked and bearing your orator's marks as aforesaid, prior to the filing of this bill and within six (6) years last past has, at the City of New York and in the Borough of Manhattan, in the District aforesaid, and at various other places in the United States, infringed upon your orator's exclusive rights under said Letters-Patent and upon your orator's said trade mark and has unfairly competed with your orator by selling to the trade large number of screens containing and embodying the improvements and inventions set forth and described in said Letters-Patent No 966,599, each of said screens having affixed thereto a metal tag or plate bearing certain marks and designs in imitation of your orator's said marks and designs, which said screens not only infringed upon your orator's exclusive rights under said Letters-Patent, but also violated your orator's rights in that the said infringing screens were made in close simulation and imitation of your orator's said
7 patented screens, both in construction and appearance, and were marked with tags or plates and with letters and designs simulating the appearance of your orator's said goods and that the said defendant, by means of said simulation and marking, sought and intended to mislead and deceive the Public into the belief that the defendant's said screens so made and marked by it were the screens of your orator, and that the defendant's said screens and marks were well calculated to deceive and mislead the public into the belief that the defendant's goods were the goods of your orator and caused confusion in the minds of the Public respecting the origin of the said goods.

8. A sample of the screen manufactured by your orator under and in accordance with the said Letters-Patent and having the said metal plate bearing said marks and other indicia is filed herewith as an exhibit, marked "Complainant's Exhibit, Complainant's Screen," and a specimen of the screen made and sold by the said defendant and sold in this district as aforesaid is also herewith filed, marked "Complainant's Exhibit, Defendant's Screen."

9. That in addition to the metal tags or plates used by your orator in identifying its said screens, your orator has also for several years last past pasted upon the boxes containing the screens printed labels of a special design, color and size, a specimen whereof is hereto attached marked "Complainant's Exhibit, Complainant's Label"; and the defendant has also in the sale of its infringing screens pasted upon the boxes containing the same as shipped from its factory a similar printed label of the same size and color and in every material respect like unto your orator's; that the com-
8 plainant first adopted and has used as a distinguishing mark or name for its screen the hyphenated words "Ton-Cap" and that the defendant has used the hyphenated words "Rek-Tang," the

similar use and arrangement, style and lettering and the like in the two labels further tending to confuse the products of the defendant with those of your orator and operating to the injury and damage of your orator.

10. That the aforesaid acts of the defendant are in violation and infringement of your orator's said Letters-Patent and also in violation of your orator's trade mark and other rights and has caused and is causing your orator great loss and damage; that not only is the defendant's said screen an infringement of your orator's said patent, but that it is also in the marks and dress in which it is offered to the public an infringement of your orator's exclusive rights growing out of this adoption and use of the said tag or plate and marks thereon and the said label, and that in this and many other ways as in advertisements and catalogs and the like the defendant has simulated the appearance of your orator's goods, copied its methods of doing business and has unfairly competed with your orator; that the defendant's screens are inferior in quality and workmanship to those of your orator and the putting out of the same in simulation of your orator's construction and of its marks and indicia has the effect to bring the products of your said orator into disrepute.

11. That the defendant has sold within the Southern District of New York and elsewhere within the United States a large number of said infringing screens, but how many your orator does not know and prays discovery thereof; that it has received therefor
9 large gains and profits, the exact amount of which your orator does not know, but prays an accounting therefor, and has caused and is causing your orator great damage and loss, the exact amount of which your orator can not state but which your orator believes and therefore charges exceeds the sum or value of Five Thousand ($5,000.00) Dollars.

Forasmuch, as your orator can have no adequate relief, except in a Court of Equity, and as said acts and doings and proceedings of the defendant are contrary to equity, your orator prays:

(*a*) That the said defendant be required by decree of this Honorable Court to account for and pay unto your orator such gains and profits as have accrued or arisen or have been earned or received by the defendant, and all of such gains and profits as would have accrued or arisen unto your orator but for the unlawful acts of this defendant, and all damages your orator has sustained thereby.

(*b*) That the said defendant may be compelled by the order of this Honorable Court, to deliver up to the judicial custody for destruction, in manner to be provided for in said order, all infringing screens in the possession or under the control of said defendant.

(*c*) That the said defendant, its associates, attorneys, servants, clerks, agents and workmen may be perpetually restrained and enjoined, by a writ of injunction issuing out of and under the seal of this Honorable Court, from directly or indirectly making or causing to be made, using or causing to be used, selling or causing to be sold, or giving away, or in any manner disposing of any screens embody-

ing or constructed or operated in accordance with the invention or improvement set forth in the Letters-Patent aforesaid.

10 (*d*) That the defendant, its agents, attorneys, clerks, employes and servants, and all persons acting for it, them or under their instructions or under their control, or deriving their authority from them, may be perpetually enjoined and restrained, by an injunction issuing out of and under the seal of this Honorable Court, from further infringing upon the rights of the complainant herein, by manufacturing and selling, or offering for sale screens which are in appearance the same or substantially the same as to their principal features, as the screens manufactured and sold by the complainant, and from copying or imitating the said screens so manufactured and sold by the complainant, and by selling or attempting to sell screens so copied, or which are in imitation of the screens manufactured by the complainant, and from manufacturing and selling, or offering for sale as the screens of the complainant, screens which are not the screens manufactured or sold by the complainant, and from attempting to cause the screens manufactured by the defendant to be mistaken in the market as the screens of the complainant; and from selling and offering for sale screens so closely resembling in appearance the screens of the complainant as to be calculated to mislead the trade or the public, and from manufacturing and selling, or offering for sale, screens having thereon plates or tags like or similar to those used by your orator as aforesaid or like or similar to those used by the defendant as aforesaid or otherwise proceeding in unfair competition with the screens manufactured and sold by the complainant, and otherwise in every way restraining the fraudulent acts of the defendant, whether the same have taken place or are about to take place; and in every way prohibiting the defendant from doing any act or thing whatso-

11 ever to cause any screens manufactured or sold by it, not the manufacture of your orator, to be mistaken in the market, or offered or sold as the screen of your orator, and granting unto your orator whatever injunction relief may be necessary in the premises in every way to prohibit the defendant from selling, or from offering to sell any screens which in appearance shall so closely resemble the screen of your orator as to be calculated to mislead, or which shall be so marked, dressed or represented as to mislead the public or cause confusion in the trade, and generally in every way grant unto your orator the injunctive relief to which in equity on the facts as they so appear your orator may be entitled.

(*e*) That a preliminary injunction may be issued directed to the said defendant, its agents, attorneys, clerks, employes and servants, to the same purport and tenor and effect as hereinbefore prayed for with regard to said perpetual injunction.

(*f*) That said Letters-Patent No. 966,599 may be decreed to be valid, and your orator to be the lawful owner of the same, and the manufacture, use and sale by the defendant to — an infringement thereof.

(*g*) And your orator further prays that the said defendant may be decreed to account unto it for the proceeds of the sale of all such

screens so sold by the defendant in infringement of your orator's rights, as hereinbefore complained of, and that the defendant pay unto your orator the amount which upon accounting shall be found to be due your orator, either as profits or damages, or otherwise, due to the fraudulent and unlawful acts of the defendant, and in infringement of the rights of your orator, and of such gains and profits as would have accrued to your orator but for the un-
12 lawful doings of the defendant, and all damages your orator has sustained thereby.

(*h*) That your orator may have such other relief in the premises to which in equity it is entitled, as the same shall appear to *by* just and equitable, and that it may have such relief the same as if it were here now made the subject of a special prayer.

(*i*) That the defendant may be decreed to pay the costs and charges of this suit.

To the end, therefore, that the defendant may, if it can, show why your orator should not have the relief prayed for, and may full, true and direct answer make, (but not under oath, answer under oath being expressly waived), according to the best and utmost of its knowledge, information, remembrance and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were repeated paragraph by paragraph, and the said defendant thereto specifically interrogated, may it please Your Honors to grant a writ of subpœna ad respondendum, issuing out of and under the seal of this Honorable Court directed to said defendant, The Ludlow-Saylor Wire Company, commanding it to appear and make answer to this bill of Complaint, and to perform and abide by such order and decree as to this Court may seem just.

And your orator will ever pray.

THE W. S. TYLER COMPANY,
PROCTOR PATTERSON,
Vice-Prest.

D. ANTHONY USINA,
Solicitor for the Complainant,
71 *Broadway, New York, N. Y.*

FRANK H. GINN,
C. C. LINTHICUM,
JAMES NEGLEY COOKE,
Of Counsel.

13 STATE OF OHIO,
County of Cuyahoga, ss:

Proctor Patterson, being duly sworn, deposes and says that he is the Vice-President of the Corporation named in the foregoing bill; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes the same to be true; that the reason why this verification is not made by the Complainant is that the Complainant is a corporation.

PROCTOR PATTERSON.

Sworn to and subscribed before me this 11th day of March, A. D., 1912.

EARL P. DISBRO,
Notary Public.

My commission expires Oct. 16, 1914.

Plea to Charge of Infringement of Patent.

In the District Court of the United States in and for the Southern District of New York.

In Equity. 9–101.

THE W. S. TYLER COMPANY, Complainant,
v.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The Plea of the Defendant, Ludlow-Saylor Wire Company, to the Bill of Complaint.

14 And now comes the defendant, the Ludlow-Saylor Wire Company, and specially appearing under protest for the purpose of this plea, and for no other purpose, and not confessing any of the matters contained in the bill of complaint to be true in manner and form as the same are therein set forth and alleged, for plea to so much and such part of the said bill of complaint as charges the defendant with infringement of Letters Patent of the United States of America, number 966,599, for Woven Wire Fabric for Screens, pleads thereto and says:

That at the time of bringing this suit, the complainant was and now is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a resident and inhabitant of the Eastern Division of the Northern District of Ohio, and a citizen of the State of Ohio; and that at the commencement of this suit, the defendant was not and is not now a resident or an inhabitant of the Southern District of New York, where this suit is brought, or a citizen of New York, but says that at the commencement of this suit it was and is a corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, and was and is an inhabitant of and residing in and that it now resides in the Eastern Division of the Eastern District of the State of Missouri, and not in the Southern District of New York, where this suit is brought.

That by its bill filed in this cause, the complainant in this cause, amongst other things charges the defendant with infringement of said Letters Patent of the United States No. 966,599 for wire screens and alleges for the purpose of showing jurisdiction in this

15 Court, that the said defendant, the Ludlow-Saylor Wire Company has a regular and established office and place of business at No 30 Church Street, Borough of Manhattan, City of New

York, in the Southern District of New York, and that some of the acts of alleged infringement complained of in said bill were committed in said Southern District of New York.

Defendant says it is not true that the defendant has a regular and established office and place of business at No. 30 Church Street, Borough of Manhattan, City of New York, in the Southern District of New York, as alleged in the bill of complaint or at any other place in the said Southern District of New York.

And it is not true that any of the alleged acts of *of* alleged infringement by defendant complained of in said bill were committed in the said Southern District of New York.

Defendant states the truth and the fact to be that at and before the filing of said bill it had and still has a business arrangement with one B. C. Guerin, to solicit orders within the States of Pennsylvania and New Jersey, and within the Southern District of New York, for the goods which defendant manufactures at the City of St. Louis and State of Missouri.

That said B. C. Guerin was not and is not an officer of the defendant, nor has he at any time had nor has he now any authority to represent the defendant in any manner or to any extent or for any purpose except to solicit and take orders for its said goods, subject to its acceptance or rejection, and transmit the same to the defendant at its place of business in the City of St. Louis and State of Missouri; and defendant says it is informed and believes, and therefore states the fact to be that the acts of said Guerin on its behalf
16 have at all times been limited to the soliciting and taking of such orders, and that the said Guerin has not at any time represented or assumed to represent the defendant otherwise than as above stated.

That defendant had not at or before the filing of the bill herein and has not since had and has not now, any officer or agent or employee of any character or description representing it in any way or at any place within said Southern District of New York, other than said B. C. Guerin.

That at said times said Guerin also represented and still represents the Hendrick Manufacturing Company, Manufactur*ing* of perforated metals and general sheet iron work, whose home office and place of business was and is at the City of Carbondale, Pennsylvania, under some arrangement, the particulars of which are unknown to the defendant. That the said B. C. Guerin at and before the filing of this suit, occupied and now occupies an office in the office building No. 30 Church Street, in the City of New York, and Southern District of New York, the rental of which office and the wages of the stenographer employed by said B. C. Guerin in said office were and are paid jointly by the said Hendrick Manufacturing Company and the defendant.

That at and before the filing of this suit, there appeared and still appears upon the door of said office in said office building No. 30 Church Street, the following:

"1028" (Being number of the room.)
"Hendrock Manufacturing Company. Perforated Metals, General Sheet Iron Work. Home Office Carbondale, Pennsylvania.
17 The Ludlow-Saylor Wire Company. Home Office St. Louis, Missouri. Manufacturers of the 'Perfect' Double Crimped Wire Cloth and Mining Screen.

B. C. GUERIN."

That said office has not at any time been and is not now for the use of defendant and has not any time been and is not now used by defendant, but at all times has been and still is, solely for the use of and has been and still is used by the said Guerin solely for the transaction of his own business in connection with the said Hendrick Manufacturing Company, and his own business in connection with the defendant, as herein particularly set forth, and such other of his affairs as he has chosen or may choose to transact therein, but not for the business of the defendant in any sense other than in such limited and qualified sense as may appear from the facts herein stated.

That defendant has at no time had and now has no other connection with the said office than the joint payment of the rental therefor with the said Hendrick Manufacturing Company, which rental it pays as part of its compensation to said Guerin.

That in addition to the joint payment of the rental of said office and the wages of said stenographer as aforesaid, the defendant has paid the said Guerin as compensation for his services to it, a nominal monthly salary and commission on such orders sent it by him, as have been accepted by the defendant.

And defendant says on information and belief the said office at said office building No. 30 Church Street is the place referred to by the complainant in its bill and alleged therein to be a regular and established office of the defendant.

That said Guerin has not at any time had, nor has he now,
18 any power or authority to make any outright sales of defendant's goods, for or on behalf of the defendant, but his authority has been and is limited to the soliciting and taking of orders for the defendant's goods as hereinbefore set forth.

And defendant avers the fact to be that the said Guerin has not at any time made any outright sales of defendant's goods, for or on behalf of the defendant, within said Southern District of New York, or elsewhere, but has at all times kept within the said limitation of his authority.

That all such orders taken by the said Guerin within said Southern District of New York, or elsewhere, for delivery, if accepted, within said Southern District of New York or elsewhere, have been transmitted by the said Guerin to the defendant, at its office and place of business in the City of St. Louis, Missouri, where such orders have been either accepted or rejected by the defendant. That all such orders sent in by said Guerin, which have been accepted by the defendant have been filled from said City of St. Louis, Missouri, and have been there delivered to the common carrier for transmission

to the purchaser and have been billed by the defendant to the purchaser from there.

That the defendant had not at any time at or before the filing of this suit had any goods in the Southern District of New York, out of which orders could be or have been filled, nor has it had at any time since, nor has it now any goods within said Southern District of New York out of which orders have been or could be or can be filled.

That defendant has never at any time either before or since the filing of the bill in this cause, kept any books of account within said Southern District of New York, nor does it now keep any such books therein, but all its books of account are and at all times have
19 been kept at its office and place of business in said City of St. Louis. That said Guerin has not at any time been authorized, nor is he now authorized to collect money on any orders taken by him, and accepted and filled by the defendant. But that all payments for goods on orders taken by said Guerin and accepted by the defendant, have been sent to the defendant at its said office and place of business in the said City of St. Louis, directly by the purchasers of goods.

Defendant further says that its factory in which it manufactures all its goods, is located in the City of St. Louis, Missouri, and that the wire screens which the complainant by its bill alleges to be infringements of its alleged patent, are all manufactured at the said City of St. Louis, Missouri.

And defendant says that it has not at any time manufactured, sold or used within the Southern District of New York, any of the alleged infringing wire screens.

Wherefore, defendant says that complainant is not entitled to have or maintain this action against it, based upon charges of infringement of said United States Patent, and this Court is without jurisdiction to entertain such action, because it says that the said District Court of the United States for the Eastern Division of the Eastern District of Missouri has jurisdiction of the controversy between the complainant and the defendant based on such charges of infringement of said patent as set forth in said bill and not this Court.

All of which matters and things this defendant avers to be true, and pleads the same in abatement to so much and such part of complainant's bill as charges the defendant with the infringement of said patent, and prays the judgment of the Court whether it shall be compelled to further answer said bill and prays to be hence
20 dismissed with its costs.

THE LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND *Solicitor.*

JAS. P. DAWSON,
WM. E. GARVIN,
Of Counsel.

I, Augutus N. Hand, Solicitor for the defendant in the above entitled cause, do hereby certify that the above plea is well founded in law.

AUGUSTUS N. HAND.

JAS. P. DAUSON,
WM. E. GARVIN,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern Division of the
Eastern District of Missouri, ss:

Frank Low, being duly sworn on oath says that he is the Vice President of the Ludlow-Saylor Wire Company, defendant in the above entitled cause: that he has read the foregoing plea and knows the contents thereof. And that the same is true in point of fact and is not interposed for the purpose of delay. That the reason why this verification is not made by the said defendant, is that the defendant is a corporation and can only speak by its officers.

FRANK LOW.

Sworn to and subscribed before me this 26th day of April A. D., 1912.

[SEAL.]

W. W. NALL,
Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Mo.

21 *Plea to Charge of Unfair Competition.*

In the District Court of the United States in and for the Southern District of New York.

In Equity. 9–101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The Plea of the Ludlow-Saylor Wire Company, Defendant, to the Bill of Complaint.

And now comes the defendant, the Ludlow-Saylor Wire Company, and specially appearing under protest, for the purpose of this plea, and for no other purpose, and not confessing any of the matters contained in the bill of complaint to be true, in manner and form as the same are therein set forth and alleged, for plea to so much and such part of said bill as alleges unfair competition in trade by the defendant, and prays relief as against and on account of such alleged unfair competition, pleads thereto and says:

That at the time of bringing of this suit, the complainant was and now is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a resident and inhabitant of the Eastern Division of the Northern District of Ohio,

and a citizen of said State of Ohio, and was not at said time and is not now, a resident or inhabitant of the Southern District of New York, where this suit is brought or a citizen of said State of New York; that at the commencement of this suit the defendant
22 was not and is not now a resident or an inhabitant of the Southern District of New York where this suit is brought, or a citizen of New York, but says that at and before the commencement of this suit, it was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, and was at said time an inhabitant of and residing and is now an inhabitant of and residing in the Eastern Division of the Eastern District of the State of Missouri, and not in the Southern District of New York, where this suit is brought.

That by its bill filed in this cause, the complainant in this cause, amongst other things charges the defendant with unfair competition in trade and seeks relief against the defendant based on such charges of unfair competition.

But defendant shows to the Court that in such action between the parties to this suit there is no ground of Federal jurisdiction other than that the complainant and defendant are citizens, residents and inhabitants of different States, and that the defendant can not be sued without its consent in any Federal Court other than in the District where either the plaintiff or the defendant resides.

Wherefore defendant says that complainant is not entitled to have or maintain this action against it based upon charges of unfair competition in this District or in this Court, and this Court is without jurisdiction against the objection of the defendant to entertain such action.

And defendant pleads its privilege to be sued in the Eastern Division of the Eastern District of Missouri, whereof it is an inhabitant and resident or in the Eastern Division of the
23 Northern District of Ohio, whereof the complainant is a resident and inhabitant, and insists upon its exemption from suit on such charges in this Court, because it says that the said District Court of the United States for the Eastern Division of the Northern District of Ohio and the District Court of the United States for the Eastern Division of the Eastern District of Missouri, have jurisdiction of the controversy between the complainant and the defendant, based on such charges of unfair competition as set forth in said bill and not this Court.

All of which matters and things this defendant avers to be true and pleads the same in abatement to so much and such part of complainant's bill as charges defendant with unfair competition in trade, and prays the judgment of the Court whether it shall be compelled to further answer said bill and prays to be hence dismissed with its costs.

THE LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND, *Solicitor.*

JAS. P. DAWSON,
WM. E. GARVIN,
Of Counsel.

I, Augustus N. Hand, Solicitor for the defendant in the above entitled cause, do hereby certify that the above plea is well founded in law.

AUGUSTUS N. HAND,
Solicitor for Defendant.

JAS. P. DAUSON,
WM. E. GARVIN,
Of Counsel.

24 UNITED STATES OF AMERICA,
Eastern Division of the Eastern District of Missouri, ss:

Frank Low, being duly sworn on his oath says that he is the vice-president of the Ludlow-Saylor Wire Company, defendant in the above entitled cause; that he has read the foregoing plea and knows the contents thereof, and that the same is true in point of fact, and is not interposed for the purpose of delay.

That the reason why this verification is not made by the said defendant is that the defendant is a corporation and can only speak by its officers.

FRANK LOW.

Sworn to and subscribed before me this 26 day of April, A. D., 1912.

[SEAL.]

W. W. NALL,
Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

Plea to Charge of Infringement of Trade-mark.

In the District Court of the United States in and for the Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The Plea of the Ludlow-Saylor Wire Company, Defendant, to the Bill of Complaint.

25 And now comes the defendant, the Ludlow-Saylor Wire Company, and specially appearing under protest, for the purpose of this plea, and for no other purpose, and not confessing any of the matters contained in the bill of complaint to be true, in manner and form as the same are therein set forth and alleged, for plea to so much and such part of said bill as alleges infringement by defendant of an alleged trade-mark (not therein alleged to be regis-

tered in the Patent Office of the United States) and prays relief as against and on account of such alleged infringement of such alleged trade-mark, pleads thereto and says:

That at the time of bringing of this suit, the complainant was and now is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a resident and inhabitant of the Eastern Division of the Northern District of Ohio, and a citizen of said State of Ohio, and was not at said time and is not now, a resident or inhabitant of the Southern District of New York, where this suit is brought, or a citizen of said State of New York; that at the commencement of this suit the defendant was not and is not now a resident or an inhabitant of the Southern District of New York where this suit is brought, or a citizen of New York but says that at and before the commencement of this suit, it was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, and was at said time an inhabitant of and residing — and is now an inhabitant of and residing in the Eastern Division of the Eastern District of the State of Missouri, and not in the Southern District of New York, where this suit is brought.

26 That by its bill filed in this cause, the complainant in this cause, amongst other things charges the defendant with infringement of a trade-mark (not therein alleged to be registered in the Patent Office of the United States), and seeks relief against defendant based on said charge of infringement of said alleged trade-mark.

But defendant shows to the Court that in such action between the parties to this suit there is no ground of Federal jurisdiction other than that the complainant and defendant are citizens, residents and inhabitants of different States, and that the defendant can not be sued without its consent in any Federal Court other than in the District where either the plaintiff or the defendant resides.

Wherefore defendant says that complainant is not entitled to have or maintain this action against it based upon charges of infringement of a trade-mark, in this District or in this Court, and this Court is without jurisdiction against the objection of the defendant, to entertain such action.

And defendant pleads its privilege to be sued in the Eastern Division of the Eastern District of Missouri, whereof it is an inhabitant and resident or in the Eastern Division of the Northern District of Ohio, whereof the complainant is a resident and inhabitant, and insists upon its exemption from suit on such charges in this Court, because it says that the said District Court of the United States for the Eastern Division of the Northern District of Ohio and the District Court of the United States for the Eastern Division of the Eastern District of Missouri have jurisdiction of the controversy between the complainant and the defendant,

27 based on such charges of infringement of an unregistered trade-mark, as set forth in said bill, and not this Court.

All of which matters and things this defendant avers to be true and pleads the same in abatement to so much and such part of complainant's bill as charges the defendant with infringement of such

alleged trade-mark, and prays the judgment of the Court whether it shall be compelled to further answer said bill and prays to be hence dismissed with its costs.

THE LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND, *Solicitor.*

JAS. P. DAWSON,
WM. E. GARVIN,
Of Counsel.

I, Augustus N. Hand, solicitor for the defendant in the above entitled cause, do hereby certify that the above plea is well founded in law.

AUGUSTUS N. HAND, *Solicitor.*

JAS. P. DAUSON,
WM. E. GARVIN,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
District of Missouri, ss:

Frank Low, being duly sworn on his oath says, that he is the Vice-President of the Ludlow-Saylor Wire Company, defendant in the above entitled cause; that he has read the foregoing and knows the contents thereof, and that the same is true in point of fact, and is not interposed for the purpose of delay.

28 That the reason why this verification is not made by the said defendant is that the defendant is a corporation and can only speak by its officers.

FRANK LOW.

Sworn to and subscribed before me this 26th day of April, A. D., 1912.

[SEAL.]

W. W. NALL,
Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Mo.

Notice of Motion.

In the District Court of the United States, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

To the Clerk of the District Court of the United States, Southern District of New York at the City of New York:

Please enter the Special appearance of the defendant in the above entitled Cause and the Special appearance of ourselves as its So-

licitors for the sole purpose of objecting to the jurisdiction of this Court to compel the defendant to appear and answer in said Cause:

29 Because the return of the United States Marshall upon the Subpœna issued in this Cause does not show that said subpœna was exhibited to the defendant or to any officer or agent of the defendant or that any copy thereof was left with the defendant or any officer or agent of the defendant.

Because said return does not show that the person to whom the said Marshall states he exhibited said Subpœna and with whom he states he left a copy thereof was any officer or agent of the defendant, or that such person was engaged in conducting business of the defendant at any regular or established place of business of the defendant within the Southern District of New York.

Because the complainant by its bill filed in this Cause charges the defendant with unfair competition and with infringement of an alleged patent. But the defendant says it is not an inhabitant of this district or citizen of this State but is a corporation organized under the laws of the State of Missouri and a citizen and inhabitant of said State and that complainant is not entitled to have or maintain any action based upon a charge of unfair competition in this district or in this Court, and that this Court is without jurisdiction to entertain such action.

Because the defendant says that complainant is not entitled to maintain any action against it based on a charge of infringement of a patent in this district or in this Court because the defendant is not an inhabitant of this district and has no regular or established place of business in this district and this Court is without jurisdiction to entertain such action.

30 All of which objections the defendant will bring before the Court by appropriate motions and pleas.

Dated, April 1st, 1912.

LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND, *Its Solicitor*,
49 *Wall Street, Borough of Manhattan, New York City.*

Order Allowing Filing of Defendant's Pleas.

At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Post-Office Building in New York County, on the 6th Day of May, 1912.

Present: Hon. George C. Holt, U. S. Judge.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Plaintiff,
against
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

On reading the Bill of Complaint in the above entitled suit on file in the Office of the Clerk of this Court, and the special appearance

of the defendant herein by Augustus N. Hand, his Solicitor,
31 for the sole purpose of objecting to the jurisdiction of this Court to compel the defendant to appear and answer in said cause, and on reading

(1) The Plea of the defendant herein to so much and such part of the said Bill of Complaint as charges the defendant with infringement of Letters Patent of the United States of America No. 966599 for woven wire fabric for screens; and

(2) The Plea of the defendant to so much and such part of said Bill of Complaint as alleges infringement by defendant of an alleged trade-mark; and

(3) The Plea of the defendant to so much and such part of said Bill of Complaint as alleges unfair competition in trade by the defendant.

And after hearing Augustus N. Hand, solicitor for the defendant, who has appeared in this case for the sole purpose of objecting to the jurisdiction of this Court to compel the defendant to appear and answer in said cause;

Now on motion of Augustus N. Hand, solicitor for said defendant, it is

Ordered, that the above named Ludlow-Saylor Wire Company be and it hereby is authorized and allowed to file the said three separate Pleas, and each of them, in the Office of the Clerk of this Court.

GEO. C. HOLT.

32 *Replication to Pleas of Defendant.*

United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY
vs.
THE LUDLOW-SAYLOR WIRE COMPANY.

This replicant, W. S. Tyler Company, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the pleas of the defendant, Ludlow-Saylor Wire Company, for replication thereunto, saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to answer unto by the said defendant. And that the plea of the said defendant is very uncertain, evasive and insufficient in law to be inquired into by this replicant; without that, that any other matter or thing in the said plea contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as and by its said bill it hath already prayed.

New York, July 15, 1912.

D. ANTHONY USINA,
Solicitor for Complainant.

Filed, July 16, 1912.

33 *Notice of Motion.*

In the District Court of the United States, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

SIR: Please Take Notice that upon the Bill of Complaint in this cause, the Precipe, the Writ of Subpœna herein, and the Return of the Marshal upon said Writ, said Return bearing date March 13th, 1912, and filed on said date in the Office of the Clerk of the United States District Court for the Southern District of New York, all said papers being on file in the Office of said Clerk, a motion will be made at a Term of the United States District Court, Southern District of New York, to be held in the Post Office Building in the Borough of Manhattan, City of New York, on the 24th day of May, 1912, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order quashing the Return of the Marshal, to the Writ of Subpœna addressed to the defendant issued in said cause.

(1) Because said return of the United States Marshal upon the said subpœna does not show that said subpœna was exhibited
34 to the defendant or to any officer or agent of the defendant, or that any copy thereof was left with the defendant or any officer or agent of the defendant.

(2) Because said return does not show that the person to whom the said marshal states in said return he exhibited said subpœna, and with whom he states in said return he left a copy thereof was any officer or agent of the defendant, or that such person was engaged in conducting business of the defendant, at any regular or established place of business of the defendant, within the Southern District of New York.

And vacating and holding the said return for naught, and adjudging that the defendant shall not be compelled to appear or answer herein, and dismissing the Bill of Complaint on the ground that the Court has obtained no jurisdiction of the defendant herein, and for such other and further relief as to the Court may seem just.

Dated, New York, May 6th, 1912.

Yours, &c.,

AUGUSTUS N. HAND,
Solicitor for Defendant, Appearing Specially for the Reason of Objecting to the Jurisdiction of This Court to Compel the Defendant to Appear and Answer in This Cause.

Office & P. O. Address, No. 49 Wall Street, Borough of Manhattan, New York City.

To D. Anthony Usina, Esq., Solicitor for Complainant, No. 71 Broadway, Borough of Manhattan, New York City.

35 *Stipulation Extending Time for Hearing of Motion.*

In the District Court of the United States, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

It is Stipulated and Agreed between solicitors for the respective parties that defendant's motion for an order quashing the return of the marshal which is now set for hearing on the 24th inst. be continued over to Friday the 31st instant.

Dated, New York, May 21st, 1912.

D. ANTHONY USINA,
Solicitor for Complainant.
AUGUSTUS N. HAND,
Solicitor for Defendant, Appearing Specially as per Appearance Filed in This Suit.

Filed, Aug. 7, 1912.

36 *Order as to Sustaining Defendant's Pleas.*

At a Stated Term of the United States District Court Held at the United States Post-office Building on the — Day of October, 1912.

Present: E. Henry Lacombe, U. S. Circuit Judge.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Plaintiff,
against
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The argument upon the several Pleas of the defendant in this cause heretofore noticed for argument at a term of this Court held on the 7th day of June, 1912, and thereafter duly adjourned to a term of this Court held on the 14th day of June, 1912, having regularly come on to be heard upon the said last named day upon the Bill of Complaint and the three separate pleas of the defendant thereto;

And after hearing James P. Dawson of Counsel for the defendant

in support of said Pleas, and D. Anthony Usina of Counsel for the Complainant in opposition thereto,

Now on motion of Augustus N. Hand, Solicitor for the defendant herein (appearing specially for the purpose of objecting to the jurisdiction of this Court in accordance with the three separate Pleas heretofore interposed and filed by said defendant), it is

37 Ordered, Adjudged and Decreed that the three separate Pleas of the defendant to the Complaint herein be and the same hereby each are sustained and it is hereby further

Ordered: That so much of the bill as charges infringement of unregistered trade-mark and unfair competition is dismissed on the ground that this Court has no jurisdiction of these two controversies, and it is further

Ordered: That the complainant be allowed to file a replication and join issue upon the Plea to that portion of the Bill of Complaint relating to an alleged infringement of Letters Patent and not to the other Pleas, to the portions of the Bill of Complaint alleging infringement of an unregistered trade-mark and unfair competition.

New York, October 4, 1912.

(S'g'd) E. HENRY LACOMBE,
U. S. C. J.

Replication to Plea on Patent Infringement.

In the United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY
vs.
THE LUDLOW-SAYLOR WIRE COMPANY.

This Replicant, W. S. Tyler Company, saving and reserving to itself all and all manner of advantages of exception which

38 may be had and taken to the manifold errors, uncertainties and insufficiencies of the plea of the Defendant, Ludlow-Saylor Wire Company, to such part of the bill of complaint as charges the Defendant with infringement of Letters Patent, for replication thereunto, saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to answer unto by the said Defendant, and that the plea of the said Defendant is very uncertain, evasive and insufficient in law to be inquired into by this Replicant; without that, that any other matter or thing in the said plea contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this Replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as and by its said bill it hath already prayed.

New York, October 5, 1912.

D. ANTHONY USINA,
Solicitor for Complainant.

Guerin Deposition.

BYRAN C. GUERIN, a witness called on behalf of complainant, being duly sworn, testified as follows:

I am 37 years old, reside in Orange, New Jersey and am at present the representative of the Hendrick Manufacturing Company of Carbondale, Pennsylvania.

39 From January, 1911, to July, 1912, I was the eastern representative of Ludlow-Saylor Wire Company, the defendant in this case. I sold wire cloth manufactured by them and received payment in the form of a salary and commission, traveling expenses were also paid. I solicited orders for the same, which orders were usually addressed to Ludlow-Saylor Wire Co., 30 Church Street, New York; some times the additional address was given of B. C. Guerin, Agent. A portion of the entrance door of my office was inscribed with the name of The Ludlow-Saylor Wire Company. My name also appeared on the door without designation. In some cases when I received an order for Ludlow-Saylor Wire Company copies of the original order were mailed to the Company at St. Louis and I retained the original. In other cases a copy of the original order, together with the original received, were mailed to the company at St. Louis. Relative to filling the actual orders received would state that I had no part in this operation. It was my duty to solicit orders, forward them when received to the home office for execution. The orders were paid for by those making the purchase. In some cases the remittance was sent direct to the Ludlow-Saylor Wire Company at St. Louis; in other cases the payment was made through me. When the payment was made through me I received the check and in turn sent it forward to the company at St. Louis. The check was never drawn to me personally. I always acknowledged the receipt of funds in the form of a letter to customers, actual receipts were sent from the home office. There may be one exception to this usual method. I would not care to swear that I did not give a receipt in this instance, although it is my impression that the same

40 course was followed as in previous instances. This exception was a transaction which transpired in Brooklyn. It was claimed by our customer that the material shipped was not as order specified. It was therefore necessary to make an adjustment in the settlement of the account. It was left in my hands to adjust the matter to the best advantage of the Ludlow-Saylor Wire Company, which I did, and which settlement was accepted by them. The customer in this case was George Kneuper, Brooklyn, New York. I can not give the street address; his name is in the telephone book. All letters which I wrote were signed "Ludlow-Saylor Wire Company, B. C. Guerin, Eastern Representative."

All the time that I was in the employ of the Ludlow-Saylor Wire Company I received a salary and they paid a portion of the rent of my office. For a certain period they paid twenty-five ($25) dollars a month and I think afterwards it was reduced to twelve dollars and fifty cents ($12.50) a month. The lease of the office was in the

name of the Hendrick Manufacturing Company. The Ludlow-Saylor Wire Company were sub-tenants of the Hendrick Manufacturing Company under an agreement in writing of which I have no copy and which I have not seen. I sent it to our home office. (I say our home office, I mean the office of the Hendrick Manufacturing Company) at the time the Ludlow-Saylor Wire Company appointed me their eastern representative, a recommendation that some form of an agreement should be drawn up between the Ludlow-Saylor Wire Company and themselves as to the payment of the portion of rent and stenographer's services, direct to the Hendrick Manufacturing Company by Ludlow-Saylor Wire Company. I
41 received a reply to this communication in writing from our home office that such an agreement had been satisfactorily closed. I couldn't say whether I have this reply in my office or not. I could get a copy.

Objected to so much of the witness' answer as purports to be the contents of the written reply which he says he received.

I will make an effort to secure this original reply.

I came here to testify under a subpœna. I had a written contract with the Ludlow-Saylor Wire Company.

(The witness produced a number of letters relating to his contract of employment by the Ludlow-Saylor Wire Company of which the following were copied into the record.)

Of the papers produced by the witness counsel for complainant offers the following evidence and they are here copied into the record:

The Ludlow-Saylor Wire Company,
Manufacturers of "The Perfect"
Double Crimped Wire Cloth and Mining Screen,
Poultry and Farm Fences,
Window Screen Cloth and "Hex" Nettings.

"The Perfect," Trade-Mark, Co.

W.
Double Crimped.

NEWSTEAD AVE. AND WABASH TRACKS,
ST. LOUIS, Dec. 29, 1910.

42 Mr. B. C. Guerin, 30 Church St., New York.

DEAR SIR: Referring to conversation had with you when in New York, beg to advise that we shall be glad to arrange with you to represent our Company on the following basis:

We to assume one-half the salary of the stenographer, which we understand to be $70.00 per month, which would mean $35.00 per month which we would assume. Also one-half office rent, which you state is $40.00 per month. We would assume $20.00 of this amount, making a total of $55.00 per month for office rent and

stenographer. We also to pay you a asalary of $50.00 per month and allow you a commission of 5% on your sales. We feel as though the commission of 5% should be based on a certain amount of sales, and we would be willing to have the arrangement covering 5% on all sales of $3,000.00 or over for six months. No commission to be paid on less than this amount. I say six months because I think it would be better to make the arrangement covering a period of six months, and at the end of that time we will take the matter up again and we can then arrive at some conclusion as to what further arrangements should be made that would be equitable to both. You can readily understand that on sales of less than this amount it would not be profitable to you nor to us, and I feel quite sure that you can make a very much better showing than that.

If you have any further suggestions to make along this line, let us have them and upon receipt of your reply we will have a contract drawn up and sent on to you, so we can get the thing fixed up by the first of January.

43 With kind personal regards and wishing you the compliments of the season, I beg to remain,

Yours very truly,

FRANK LOW, *V. P.*

F. L.-C.

#30 CHURCH ST., N. Y., Dec. 31st, 1910.

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN: Yours of the 29th received. The suggestions you offer in contract to be made appeals to me. I am submitting this to Mr. Bassett of our company for his O. K., which I feel sure it will receive.

Yours very truly,

——— ———.

Jan. 4, 1911.

Mr. Frank Low, c/o Ludlow-Saylor Wire Co., St. Louis, Mo.

DEAR MR. LOW: Referring to your communication of Dec. 29th, beg to advise that I have to-day received Mr. Basset's formal acceptance of the terms outlined by you in communication referred to.

I have not had time to go into detail with Mr. Bassett as he has been exceedingly busy in this city to-day but will write you further to-morrow, as to the method they suggest as to the handling of details.

44 I do not know whether you have given the matter of stationery, to be used by me, any thought, or whether it is your intention to have me use plain paper in my correspondence.

Please advise.

Yours very truly,

——— ———.

New York Office

Jan. 25, 1911.

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN:

Attention Mr. Low.

I beg to acknowledge receipt of yours of Jan. 23rd and contents carefully noted. I return, herewith, one copy of agreement which I have executed and which is for your files.

I would suggest in connection with the first paragraph of this contract that you take up the items contained therein with the Hendrick Mfg. Company, confirming the arrangement as outlined. These items are not subject to my control and should be confirmed with my principals.

I am very glad we have eventually gotten this matter in a form acceptable to all concerned, and trust that none of the interested parties may ever regret having made this arrangement.

Yours very truly,

——— ———.

(Witness continues:) The "Frank Low, Vice-President" who signed the above letter dated December 29, 1910, is vice-president of the Ludlow-Saylor Wire Company. This letter was received by me December 31, 1910, and I answered it on the same day.

45 The above letter dated December 31, 1910, was signed by me and sent to the Ludlow-Saylor Wire Company. The same is true of the above letters dated January 4 and January 25, 1911.

It is stipulated between counsel that the foregoing letters of December 29, 1910, December 31, 1910, January 4, 1911, and January 25, 1911, may be put on the record with the same force and effect as proved originals, subject to timely objection and correction.

Of the papers produced by the witness counsel for complainant offers in evidence the following and it is hereby stipulated that they may be received with the same force and effect as proved originals, subject to timely objection and correction.

The Ludlow-Saylor Wire Company.

Rek-Tang
Rolled Slot Screen.

Square Mesh.
Double Crimped Wire Cloth.

ST. LOUIS, July 27, 1912.

Mr. B. C. Guerin, New York City.

DEAR SIR: We enclose herewith memorandum of sales covering your orders for the six months ending July 1st, 1912. You will notice the total amount of these orders was $3,569.38, less credits for freight etc. $69.63 leaving $3,499.75. You will also note we have deducted error in our statement of January 1st. At this time we allowed commissions on estimated amount of $2,088.68 while the

actual amount was $2,022.90 or a difference of $65.78, which
46 we have deducted from the above, making net amount $3,433.97. Commission of 5% amounting to $171.70. Stamps $5.95, entertaining customers as per your letter of the 15th inst. $50.00, making total amount of $227.65. From this we have deducted balance on hand from expense money for Pennsylvania trip $16.40.

We enclose herewith our check for $211.25 covering all commissions to which you are entitled on sales from January 1st to July 1st, 1912. We trust you will find this correct.

We also would ask you to advise relative to returning all papers, price lists, sample board, etc., which were our property. Some weeks ago you advised that you were packing these things up but up to the present time we have not received any word from you advising of shipment.

With kind regards, beg to remain,

Yours very truly,

THE LUDLOW-SAYLOR WIRE CO.
FRANK LOW, *V. P.*

F. L.-C.

(In pencil:) #47,296. May 29, 1912.

The Ludlow-Saylor Wire Company.

Rek-Tang
Rolled Slot Screen.

Square Mesh
Double Crimped Wire Cloth.

St. Louis, May 29, 1912.

Mr. B. C. Guerin, New York City.

My Dear Mr. Guerin: I have gone over very thoroughly, the records of the result of our New York Office during the
47 past year and nearly a half, and our Company do not feel that we are warranted in continuing this arrangement. I am writing you to-day to advise that we feel that it is to our interest to close this Office the first of July as the result has been anything but satisfactory to our Company. In fact, the amount of business which we have done through the New York Office in comparison with the expense of doing it, has shown us a loss. Personally, the writer has felt that a connection in New York would be advantageous to us, but from my observation and the results shown in the past year or more, I am of the opinion that there is nothing in it as far as profits are concerned.

I regret having to write you in this way. I feel sure that you have done all that would be done in that territory, but the great bulk of our business is done in the Western territory. I therefore, wish to advise you that we do not care to renew our contract with you the first of July.

I enclose herewith check for Eighty Dollars ($80.00) covering salary for May, 1912.

Will you kindly arrange to have sample board and such literature as you have of ours, shipped back to us prior to July 1st. You understand of course, that we will assume the office charge and your salary up to July 1st. Also allow you such commissions as is due you, up to that time.

I wish to say to you that I have nothing but the very kindest feelings towards you, and I know that you have done all that could be done in that territory, but I must frankly confess that I do not believe that we can profitably maintain an office in New York. You of course, are as well informed as to the amount of your sales as we are, and the result is not at all satisfactory.

With kind personal regards, I beg to remain,

Yours very truly,

FRANK LOW, *V. P.*

F. L.-C.

48 The Ludlow-Saylor Wire Company.

Rek-Tang
Rolled Slot Screen.

Square Mesh
Double Crimped Wire Cloth.

ST. LOUIS, January 18, 1912.

Mr. B. C. Guerin, 30 Church St., New York.

MY DEAR MR. GUERIN: I have your favor of the 16th and fully note contents. I note all you say in this letter and recognize the fact that during the months of November and December you were unable to give any attention to the business. As I wrote you, it seems to me that the only way we can get better results is to outline a vigorous campaign of personal solicitation, particularly covering the cement plant and other industrial institutions that use wire cloth. These different people who use these goods have got to be hunted out. I know that you feel just as we do—that what we want is results. We want just as much business as we can get in that territory, and we want to help you all we can to get it. It would seem to me that the New York territory certainly ought to be worked up to $25,000 or $30,000, a year, and this I would think a small amount of business for that territory. I believe the only way it can be done is personal solicitation, and you understand of course, as well as I do that this means more or less traveling, and probably a considerable amount of traveling.

There are a number of different purchasing men in New York who buy our goods, but they have got to be dug out and called upon.

49 I don't know whether there is any regular agency there that can give you this information, but possibly there is. I wrote to Honolulu the other day and have a reply from Alexander & Baldwin who refer us to their New York Office, 82 Wall Street. I sent this letter to you and I want you to call on them and see what they have to say. This is only one instance and I presume there are a great many different concerns who purchase our goods right in the New York Market. The Ingersoll-Rand Co., parties whom I called upon the last time I was in New York, sent us an order for 50 pieces

of Rek-Tang. This was to take the place of their order for Ton-Cap, and went to South Africa.

I simply call your attention to this to show you that there are a great many industries in New York City proper that should be looked after and gotten next to.

I note what you say about the Knickerbocker Portland Cement Co. Mr. Curtis, the Purchasing Agent of this Company is a personal friend of mine and when he went to New York he specially advised me that he would shift the account to us. While I think I told you I wanted you to make a trip up to Hudson and meet this party, I don't know of any time when you did so. As far as his business is concerned, Mr. Curtis would have sent me his business without any solicitation. It doesn't seem to me that you are entitled to a commission on that account. Aside from this account, I think you have been given credit on all orders that have come in from the Ohio and Pennsylvania territory.

If we continue this arrangement, I shall want to feel that you will be in position to get after the cement business aggressively and make regular trips into that section and try and get results.

50 The small pieces which you send us are not at all attractive to us. These orders are generally handed to Howard & Morse. We don't care for that class of business, but we do want the business of full rolls or more.

I trust you will be in shape to get back to the office very quickly and watch the accounts as I know you want to. I don't believe I shall go East with Mr. Robertson. In fact, I have no particular desire for him to go East on our account, and if he goes to New York it will be on his own account this Spring.

I hope this will find you in good shape, and with kind personal regards, beg to remain,

Yours very truly,

FRANK LOW, *V. P.*

F. L.-C.

Memorandum.

CARBONDALE, PA., 1-18-'12.

To New York Office.

Hendrick Manufacturing Co.,
Main Office and Works, Carbondale, Pa.

Re Ludlow-Saylor Wire Co.

DEAR GUERIN: Replying to your favor of the 16th:

In view of the condition of their trade last year, we are willing to meet your views as to compensation we are to receive from them for office rent and use of stenographer, and it will, therefore, be acceptable for you to send us $30.00 per month until further notice.

Yours truly,

HENDRICK MFG. CO.
L. A. BASSETT, *President.*

R. W. W.

Jan. 23rd, 1911.

51 Ludlow Saylor Wire Co., St. Louis, Mo.

Mr. Lowe.

GENTLEMEN: Yours of the 18th inst. received and contents fully noted.

The writer fully agrees with you that there is but one way to get business, and that is to "hustle" for it. One must see either the man, who uses the material, the man who purchases the same, or both. This all takes time, and is more or less expensive.

In line with your ideas, and my past experience, the burden of this work falls on me, personally. Not on the office, or its working force.

You will note, (See letter attached), that the Hendrick Mfg. Co. have given their consent to a change in the distribution of the monthly checks. You will be kind enough, therefore, when mailing checks for this month, and the following months, to send to the Hendrick Mfg. Co. the amount of thirty ($30.00) Dollars, and to me the sum of eighty ($80.00) Dollars. Total, one hundred ($110.00) Ten Dollars, the same as before.

It seems mighty nice to be back again at the office. Everyone thinks I look splendid. I find, after having had typhoid, barring a relapse, you do feel improved. A little more starch in my legs and feet is all that I need.

With best regards to all my good friends in St. Louis, I beg to remain,

Yours very truly,

——— ———.

52 Jan. 22, 1912.

Ludlow-Saylor Wire Co., St. Louis, Mo

Attention Mr. Low.

GENTLEMEN: The writer has taken up with the Hendrick Mfg. Co. the matter relative to the amount you are now paying for rent and stenographic services for this office. They agree to accept, until further notice, $12.50 to be charged up to rent and $17.50 to be charged up to salary for Miss Rittenhouse. This change to apply this month. You will, therefore, please be guided accordingly.

Yours very truly,

LUDLOW-SAYLOR WIRE CO.

WITNESS (continuing): I received the foregoing letters from the Ludlow-Saylor Wire Company dated January 18th, May 29th and July 27th, 1912. Also the letter from Hendrick Manufacturing Company dated 1/18/12. I signed and sent Ludlow-Saylor Wire Company the foregoing letters dated January 23rd, 1911, and January 22, 1912. The letter dated January 23, 1911, was written on January 23, 1912, and was dated January 23, 1911, no mistake.

The foregoing letters objected to as incompetent, irrelevant and immaterial to any issue made in the case.

The summons in this suit was presented to me at my office sometime during the month of May, 1912. On receipt thereof I forwarded it to the Ludlow-Saylor Wire Company at St. Louis and received reply from Mr. Frank Low.

Objected to as incompetent, irrelevant and immaterial as
53 regards any issue in this inquiry.

The reply which I received was in writing.

Witness produced the reply and his letter to which it is a reply, and the same were offered in evidence on behalf of complainant and were placed upon the record as follows:

March 12, 1912.

Mr. Frank P. Low, St. Louis, Mo.

DEAR MR. LOW: I enclose, herewith, subpœna which was received to-day by messenger from the Supreme Court, the bearer of this paper also had a subpœna to be served upon you personally, but as you were not here, of course nothing could be done.

If there is anything you wish me to do in connection with this notice, please advise.

Yours very truly,

——— ———.

The Ludlow Saylor Wire Company.

ST. LOUIS, March 14, 1912.

Mr. B. C. Guerip, New York City.

DEAR SIR: Replying to yours of the 12th in which you enclose subpœna from the Supreme Court, we have referred this to our attorney who will attend to the matter. There is nothing we care for you to do further in connection with this notice.

We do not know what reply you made to this service. It
54 would probably have been better if you had told the party you were simply serving us in the way of a broker but it doesn't make any difference anyway; we will have to answer the summons and will take charge of it.

Yours truly,

THE LUDLOW SAYLOR WIRE CO.,
FRANK LOW, *Vice-President.*

F.L.-C.

Defendant objects to the foregoing letter and reply upon the ground that they are incompetent, irrelevant and immaterial. Defendant makes no objection upon the ground that the copy is not the best evidence.

The only property of the Ludlow-Saylor Wire Company which I kept in the New York office were such papers as I considered of a personal nature and which applied in almost every instance to the contract which existed between the Ludlow-Saylor Wire Company and myself. The Ludlow-Saylor Wire Company wrote me a letter stating that they were withholding a certain amount of money

due me in earned commissions, which money they stated would be forthcoming when papers, price list, and display board were received by them. This material was crated, shipped to them and copy of shipping notice sent to the Ludlow-Saylor Wire Company. In due course I received a check from them covering the amount of commissions referred to and due me. I, therefore, presume that the shipment as sent to them was satisfactory else they would not have mailed me check for commissions due me. To date I have heard no further reference in this connection, and, therefore, consider the matter closed.

I also had in New York while my business relations with
55 the Ludlow-Saylor Wire Company continued printed letterheads and envelopes, catalogues and such additional papers as would accumulate from correspondence in connection with inquiries received, replies to such inquiries and a few original orders. I mean by that orders of a customer to the Ludlow-Saylor Wire Company. In addition to the foregoing, there was a miscellaneous lot of samples of wire cloth as manufactured by the Ludlow-Saylor Wire Company.

I never carried enough wire cloth to fill an order directly. I was delegated to sell wire cloth only, and authorized to dispose of no other kind of material. It was my practice to take orders both at prices determined by me and at prices established by the Ludlow-Saylor Wire Company. Upon receipt of an order I always acknowledged it from this office. I can not say positively, but I presume that the St. Louis office of the Company acknowledged receipt of orders sent to them from the New York office. When I say that I acknowledged receipt of orders I mean that I informed the customer that the order was received and would be filed, unless his order contained some clause which had not been previously agreed to.

The style of screen known in the trade as "Rek-Tang" screen is manufactured by the Ludlow-Saylor Wire Company of St. Louis, Missouri. The style of screen known as the "Ton-Cap" screen is manufactured by the W. S. Tyler Company of Cleveland, Ohio.

Q. 68. Did you ever sell Rek-Tang screen to customers who had previously been using Ton-Cap screens?

Object to that question as incompetent, irrelevant and immaterial.

A. I have sold Rek-Tang screens to customers who have
56 told me that they have used Ton-Cap screens.

Object to so much of that answer as stated to what someone else has told the witness and move that it be stricken out.

Q. 69. In such cases have you ever secured from the customer a sample of the Ton-Cap screen which he told you he had been using?

The question is objected to as incompetent, irrelevant and immaterial.

A. Yes.

Q. 70. Then the customer not only told you that he had been

using a Ton-Cap screen but gave you a sample of the screen which he had been using?

A. Yes, sir.

Q. 71. Did you secure such samples by instructions from the St. Louis office or without any instructions concerning the matter?

Objected to as incompetent, irrelevant and immaterial.

A. I received instructions to obtain such samples as I could of Ton-Cap screen from the Ludlow Saylor Wire Company. I also on my own account obtained as many samples as I could of Ton-Cap.

Q. 72. Your last answer is a little obscure and I ask you therefore if you received instructions from the Ludlow-Saylor Wire Company in some cases to obtain such samples of Ton-Cap screens?

A. Yes, sir, I did.

Q. 73. What did you do with such samples of Ton-Cap screens?

A. It was forwarded to the Ludlow-Saylor Wire Company at St. Louis, Mo.

Q. 74. Do you know what use they made of them?

Objected to as irrelevant and immaterial.

57 A. If the samples were supplied in connection with an order which had been received the sample was obtained for the purpose of determining the method to be employed in making up screens for the Rek-Tang type, as well as to determine as far as possible the gauge of the wire used and the size of the opening to be made.

Q. 75. You say that these samples were used to determine as far as possible the gauge of the wire and the size of the opening. Were they used also to determine the quality of wire?

Objected to as irrelevant and immaterial.

A. I do not know.

WITNESS (continues): The name of the Ludlow-Saylor Wire Company appeared in the usual manner in the telephone directory in the City of New York as "Ludlow-Saylor Wire Company, 30 Church Street, Cortland 2670." My personal name appeared not in connection with that of Ludlow-Saylor Wire Company, but separately in its proper place alphabetically.

I sold an order of Rek-Tang screen to Lebedjeff Engineering Company in this City (New York). I can not say if the sample submitted is a sample of the Rek-Tang screen which I sold to the Lebedjeff Engineering Company.

Counsel for defendant has submitted certain letters concerning this sale to the Lebedjeff Company and a sample of screen.

I believe the sample of wire cloth submitted by the Lebedjoff Company in its letter dated January 25, 1912, and attached to my letter from the New York office dated January 26, 1912, on the same subject to be a sample of Ton-Cap screen. The ground of my

belief is that I had not on any previous occasion sold Rek-
58 Tang style of screen to the customer and I, therefore draw the inference that the sample submitted was not the Rek-Tang style of screen. I could not tell by inspection whether the sample was a Ton-Cap screen or a Rek-Tang screen. They look the same to me. This is true of other sizes of screens as well as the size desired by Lebedjeff Company. The envelope which I used generally at that time for the Ludlow-Saylor Wire Company's business in New York contained in the upper corner the words "If not delivered in five days, return to the Ludlow-Saylor Wire Company, 30 Church Street, New York."

Counsel for complainant offers in evidence the contract between the Ludlow-Saylor Wire Company and Guerin and this is placed in the record as follows:

The Ludlow Saylor Wire Company.

SAINT LOUIS, January, 23, 1911.

Agreement Between the Ludlow Saylor Wire Co., St. Louis, and Mr. B. C. Guerin, 30 Church Street, New York.

It is understood that we make an arrangement with you covering the first (6) six months of this year. We to assume one-half the salary of the stenographer, which you say is $70.00, which would equal $35.00 per month. Also one-half your office rent which you state is $50.00 per month. This would mean $25.00 which we would assume. Making the total amount $60.00 per month. We to pay this amount monthly to the Hendrick Manufacturing Company, Carbondale, Pa.

59 We also agree to pay you $50.00 per month salary and allow you a commission of 5% on your sales. This 5% commission on sales to be based upon sales of $3,000.00 or over for six months. No commission to be paid on less than that amount.

We make this arrangement covering the first six months of this year, and at the end of that time we can take the matter up again and can then arrive at some conclusion as to what further arrangements should be made that would be equitable to both.

Yours very truly,

THE LUDLOW-SAYLOR WIRE CO.,
FRANK LOW, *V.-P.*

Signed
B. C. GUERIN.

January 24, 1911.

Direct examination closed.
No cross-examination.

Cahall Deposition.

WILLIAM P. CAHALL, a witness called on behalf of complainant, testified as follows:

I am thirty-four years of age, reside at No. 960 Simpson Street, New York City, and am Eastern Representative of the W. S. Tyler Company, manufacturers of wire cloth and mining screen located in Cleveland, Ohio. It also manufactures ornamental iron. I have been connected with this Company as its Eastern Representative since September 1, 1908. I looked after the wire cloth and
60 mining screen business. This company manufactures wire cloth and mining screen in large quantities, and is the largest, I believe, in the United States in the manufacture of wire cloth and mining screen. It puts a wire cloth or screen on the market known under the name of "Ton-Cap."

Q. 10. What is the reputation of Ton-Cap screen on the market?

Objected to as incompetent, irrelevant and immaterial.

A. From all reports, I believe, it has been very satisfactory for the purposes for which it has been purchased.

Q. 11. For what is it used mostly?

Same objection.

A. Principally mining screen.

Q. 12. Has this Ton-Cap had a large and ready sale on the market?

Same objection.

A. Yes, since I have been connected with the company.

Q. 13. Can it be used for other purposes than mining screen?

A. Yes, there is a quite a quantity of it being used in the manufacture of cement.

I directed the purchase of screens from the defendant through the V. V. Lebedjeff Engineering & Supply Company of New York. I called at their office in person, and had a verbal conversation with a Mr. M. C. Fairchild, their purchasing agent. I first advised him that I was desirous of securing possession of a quantity of Rek-Tang screens as manufactured by the Ludlow-Saylor Wire Company, but wished it to be the same or have it stated as being the same as the small sample which I left with him at that time; which was
61 taken from a sample which I had with me of our Ton-Cap screen. I had this sample cut so that Mr. Fairchild could himself readily break a small piece off which was to be sent to Ludlow-Saylor Wire Company's New York house. Mr. Fairchild then wished to know for what purpose this screen was desired. I informed him that it was wanted for experimental and testing purposes; however, he could say when asking for quotation that the same was for export to South America, and that I would send him a confirmation to this effect and he stated that in case I would do this he would purchase the screen for me.

They placed the order with the New York office of the Ludlow-Saylor Wire Company after receiving a quotation from them, sending check in payment for same with the confirming order. I wrote a letter confirming my verbal order to Mr. Fairchild of the Lebedjeff Company and I produce a copy of that letter which is as follows:

The W. S. Tyler Company.

NEW YORK, Jan. 25, 1912.

V. V. Lebedjeff Engineering & Supply Co., No. 11 Broadway, New York City.

GENTLEMEN: This is to confirm my verbal order of January 24th, 1912, given to Mr. Fairchild, purchasing agent of your company, to secure price, quotations and order for us from the New York office of the Ludlow-Saylor Wire Company thirty (30) pieces of screen 12" x 54" each, like the sample of our screen which I handed to Mr. Fairchild, which Ludlow-Saylor screen, as I informed him, is
62 for export shipment to South America.

Yours very truly,

W. S. TYLER COMPANY,
By WM. P. CAHALL.

This Rek-Tang screens were received by the Lebedjeff Company by express, as per order.

Mr. Fairchild upon their arrival at the Lebedjeff Company's office telephoned me at our office; however, I was not in at the time. Upon my return I telephoned Mr. Fairchild and he stated that he had given the express people instructions to deliver them to our office.

They were delivered to our office and remained there until we moved from 11 Broadway. They are now at our office at 200 Fifth Avenue. They were delivered to me boxed and in good condition. I opened the box at the time and it contained the exact number and size of pieces which I had had Lebedjeff Company order. I obtained a sample of one of these screens from the box by sawing off a piece with a steel saw, which sample I here produce.

The sample was offered in evidence and marked "Complainant's Exhibit, Sample of Rek-Tang screen received through Lebedjeff."

There was no evidence that this box containing Rek-Tang screens had been interfered with or tampered with in any way before I opened it.

I produce a sample of the Ton-Cap screen which I gave to Mr. Fairchild for the purpose of ordering the screens which I received from the Ludlow-Saylor Wire Company. This piece of screen which I produce has a part of it cut out. I sawed this small piece nearly out of the larger piece, leaving just enough wires to
63 hold it in place, so that Mr. Fairchild would see that the sample came from our Ton-Cap screen. I held the large

piece in my hand and permitted Mr. Fairchild to take the small piece from it, which he did in my presence.

Q. 36. I show you a small piece of screen which has been identified by Mr. Guerin, the witness who had preceded you, as being a piece of screen that was sent to him by the Lebedjeff Company for the purpose of ordering the thirty pieces of screen from the Ludlow-Saylor Wire Company. Will you please examine this small piece of screen and state whether or not that is the piece that was removed from the larger sample of Ton-Cap which you have produced?

A. It is.

The larger piece of screen mentioned by the witness is here offered in evidence, and the same is marked "Complainant's Exhibit Ton-Cap Screen from which the Small Piece was given to the Lebedjeff Company." The smaller piece is also offered in evidence and the same is marked "Complainant's Exhibit Separated piece of Screen given to Lebedjeff Company."

Q. 37. I notice a metal tag on the larger piece of screen you have produced. Is it customary for your company to use this form of tag on this class of screen?

A. Yes.

Q. 38. Please state whether or not a similar tag in form and shape, and substantially in design and color was used on the thirty pieces of Rek-Tang screen you received from Ludlow-Saylor Wire Company through Lebedjeff Company?

64 Objected to as irrelevant and immaterial to any issue in this case and being an attempt to inject evidence into this hearing to the defendant's plea to so much of the bill as charges infringement of patent and unfair competition which has been expressly excluded from consideration by an order of the Court entered herein dismissing so much of such bill as to all parts thereof as charged unfair competition and infringement of trade-mark by the defendant.

Counsel for complainant states that complainant has a perfect right to show the attitude of the defendant in dressing up its goods by complainant by the use of labels and other matters, and that the objection of the defendants shows that it has been aggravated to a very great extent.

Defendant renews its objection.

A. There was no metal tag or tags on these thirty pieces.

Q. 39. Did the exterior of the box which contained these thirty pieces of screens contain any label which was similar to the labels used by your company on the same class of goods?

Same objection.

A. They did with the exception that our labels called for Ton-Cap and labels in this box called for Rek-Tang.

Defendant objects to this testimony and moves that it be stricken out upon the further ground that the labels spoken of by the witness are the best evidence.

Q. 40. I show you a label and ask you to state if that is one like your company uses on boxes containing their Ton-Cap screens?

Same objection.

65 A. I have seen our labels, but I don't know that I have ever seen any on a box. I have seen the labels on the Rek-Tang screen box.

Q. 41. Well, how do the labels on the Rek-Tang screen box compare with the sample I have just shown you?

Same objections.

A. Very similar with the exception of the name.

Q. 42. Are they the same color and size?

Same objection.

A. To the best of my knowledge the Rek-Tang screen labels are a little more yellow.

The Ton-Cap screen label is here offered in evidence and the same is marked "Complainant's Exhibit, W. S. Tyler's Co.'s Paper Label."

Defendants object to the introduction of said label for the same reasons heretofore urged against the testimony of this witness referring to any questions to charges of unfair competition and infringement of trade-mark.

Q. 43. I show you the correspondence, etc., as to the Lebedjeff Company's purchase of Rek-Tang screen and ask you to state if that substantially represents the manner in which this transaction was made to the best of your knowledge, such papers having been produced by defendant's counsel under the notice of this testimony?

A. These papers seem to be exactly the same as my correspondence in connection with this transaction except some additional ones produced on the part of defendant, and such correspondence is as follows:

65a The Ludlow-Saylor Wire Company.

NEW YORK, January 26, 1912.

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN: We have an inquiry from V. V. Lebedjeff Eng'r & Supply Co., this City, asking for price on 30-pieces wire cloth, 12" x 54", as per sample enclosed, herewith. This material is for export shipment to South America.

Kindly let us have reply by return mail, and return sample.

Yours very truly,

LUDLOW-SAYLOR WIRE COMPANY.
B. C. GUERIN.

The Ludlow-Saylor Wire Company.

SAINT LOUIS, Mo., Feb. 29, 1912.

Mr. B. C. Guerin, New York, N. Y.

DEAR SIR: Answering yours of the 19th we have sent receipted invoice to V. V. Lebedjeff Eng'r & Supply Co. as requested.

Yours truly,

THE LUDLOW-SAYLOR WIRE CO.
FRANK LOW, *Vice-Pres.*

F. L.-C.

66 V. V. Lebedjeff Engineering & Supply Co.

NEW YORK, January 25, 1912.

The Ludlow Saylor Wire Co., 30 Church Street, City.

GENTLEMEN: Enclosed please find sample of wire cloth of which we wish to secure 30 pieces 12″ x 54″.

Please let us have your very best price on this material packed for export shipment to South America, and oblige.

Yours very truly,

V. V. LEBEDJEFF ENGINEERING & SUPPLY CO.
M. C. FAIRCHILD, *W.*

The Ludlow-Saylor Wire Company.

SAINT LOUIS, Mo., Jan. 29, 1912.

Mr. B. C. Guerin, New York, N. Y.

DEAR SIR: We have your favor of the 26th in which you refer to inquiry from V. V. Lebedjeff Eng'r & Supply Co. We find that the sample which you sent us is equal to our #164 Rek-Tang. You may quote on 30 Pcs. 12″ x 54″ as per sample which you sent us, 32c. sq. ft. f. o. b. St. Louis.

Yours truly,

THE LUDLOW-SAYLOR WIRE CO.
FRANK LOW, *V. P.*

F. L.-C.

67 V. V. Lebedjeff Engr. & Supply Co., 11 Broadway, City.

Jan. 31, 1912.

GENTLEMEN:

Attention Mr. M. C. Fairchild.

Replying to your inquiry of the 25th inst. we are pleased to quote you for furnishing—

30-pieces, wire cloth, 12″ x 54″ as per your sample submitted which is our #164 Rek-Tang, the sum of 32 cents per sq. ft, f. o. b. St. Louis, Mo.

Thanking your for the inquiry and trusting we may be favored with your order, we beg to remain,

Yours very truly,

LUDLOW-SAYLOR WIRE COMPANY,
Eastern Representative.

Order No. 86. Date, Feb. 1, 1912.

Ship to M. V. V. Lebedjeff Engr. & Supply Co.
11 Broadway, N. Y. City.

How ship Express. Salesman Guerin.
At above. When Quickly.
Terms: Check herewith. Buyer ——.
2%—cash.

30—pcs. #164 Rek-Tang wire cloth, 12" x 54"—as per sample submitted per sq. ft. 32¢ $43.20

Material to be properly packed for export.
Their order 1289 herewith.

68 Order No. 1289.

Order from V. V. Lebedjeff Engineering & Supply Co., 11 Broadway.

NEW YORK, Jan. 31, 1912.

To Ludlow Saylor Wire Co., #30 Church St., City:

Please enter our order for the following:
Ship to us from factory stock by express collect from export shipment,

12130

30—pcs. #164 Rek-Tang wire cloth
12" x 54" @ 32¢ per sq. foot
less 2% cash.

Please send us one of your catalogues.
Marks:

Yours very truly,

V. V. LEBEDJEFF ENGINEERING & SUPPLY CO.,
Per FAIRCHILD.

The Ludlow Saylor Wire Company.

NEW YORK, Feb. 1, 1912.

Ludlow-Saylor Wire Company, St. Louis, Mo.

GENTLEMEN: We enclose, herewith, order #86 for the V. V. Lebedjeff Engineering & Supply Co. for 30 pieces of Rek-Tang Wire cloth to be shipped to them by express collect.

69 We also enclose their check for $42.34 in payment for same, and would ask that you mail these people receipted invoice. We allow them 2% discount for cash.

Yours very truly,

LUDLOW-SAYLOR WIRE CO.
B. C. GUERIN,
Eastern Representative.

Feb. 1, 1912.

V. V. Lebedjeff Engineering & Supply Co., 11 Broadway, City.

GENTLEMEN:

Attention Mr. Fairchild.

We are in receipt of your valued order #1289 for 30 pieces of wire cloth, also your check amounting to $42.34 in payment of same, for which kindly accept our thanks.

In accordance with your request we are mailing you under separate cover copy of our catalog #41, also our catalog of Rek-Tang wire cloth, the contents of which we trust may be of interest.

Awaiting your further favors with interest, we beg to remain.

Yours very truly,

LUDLOW SAYLOR WIRE CO.
B. C. GUERIN,
Eastern Representative.

The Ludlow-Saylor Wire Company.

70 SAINT LOUIS, Mo., Feb. 5, 1912.

Mr. B. C. Guerin, New York, N. Y.

DEAR SIR: We are in receipt of your favor of the 1st enclosing your order #86 for V. V. Lebedjeff Eng. & Supply Co. We have entered this order and will make shipment in ten days, and have so advised these people.

Yours truly,

THE LUDLOW-SAYLOR WIRE CO.
FRANK LOW, *Vice-Pres.*

F. L.-C.

Feb. 5, 1912.

V. V. Lebedjeff Eng. & Supply Co., 11 Broadway, New York.

GENTLEMEN: We have your order of January 31st which you handed to our Mr. B. C. Guerin calling for 30 Pcs. Rek-Tang Screen. We have entered same and will make shipment within ten days. You understand all of our Rek-Tang cloth has to be made to order, and we do not carry any of these goods in stock.

We thank you kindly for this order and beg to remain,

Yours very truly,

THE LUDLOW-SAYLOR WIRE CO.

F. L.-C.

Feb. 19, 1912.

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN: Referring to my order #86 for the V. V.
71 Lebedjeff Engr. & Supply Co., we wish you would kindly send these people receipted invoice for this material, as re-

quested in last paragraph of my letter of the 1st inst., with which communication we mailed you their check in payment of same.

Yours very truly,

LUDLOW-SAYLOR WIRE CO.,

——— ———,

Eastern Representative.

The Ludlow-Saylor Wire Company.

ST. LOUIS, Mo. 2/3/12.

Sold to V. V. Lebedjeff Engineering & Supply Co.
Shipper to New York, N. Y., 11 Broadway.
Your order No. 1289.
Factory Order No. 12130A.
Shipper Via. Am. Exp.

30—Pcs. 12″ x 54″ #164 steel Rek-Tang screen 135 sq. ft., 32	43.20
2% cash	.86
	42.34

Net 120 lbs.
Box 42 "
Gro. 162 lbs.
Entered.
Received ——.
Price O. K. W.
Charged ——.

Paid,
No. 1822,
Date 1/31/12.

Paid,
Feb. 3, 1912,
The Ludlow-Saylor Wire Co.,
Per M. F. Kohning, Jr.

72 Q. 44. I wish you would compare the list of papers covering the correspondence, etc., as to the Lebedjeff transaction which are above placed on the record with what papers you had in connection with this paper.

A. Of the papers above mentioned the following I do not have:

Letters from Mr. B. C. Guerin to Ludlow-Saylor Wire Company, dated January 26, 1912.

Letter from Frank Low, to Mr. B. C. Guerin, New York, N. Y., dated February 29, 1912.

Letter from Frank Low, V. P., to Mr. B. C. Guerin, New York, N. Y., dated January 29, 1912.

Salesman's slip to Ludlow-Saylor Wire Co. showing sale to V. V. Lebedjeff Engineering & Supply Company, 11 Broadway, New York City, dated February 1, 1912; this slip is from Mr. B. C. Guerin; (there is a stamp on this slip which is indistinct and contains the number 12130).

Letter from B. C. Guerin to Ludlow-Saylor Wire Company, St. Louis, Mo., dated February 1, 1912.

Letter from Frank Low, vice-president to Mr. B. C. Guerin, New York, N. Y., dated February 5, 1912.

Copy of letter from Eastern representative to Ludlow-Saylor Wire Company, dated February 19, 1912.

Q. 45. Among the correspondence that you have as to this transaction what papers do you find which were not among the papers furnished by defendant's counsel under the notice mentioned?

A. Letter from Frank Low, vice-president to V. V. Lebedjeff Engineering & Supply Co., 11 Broadway, New York, dated February 29, 1912.

Receipted invoice from The Ludlow-Saylor Wire Company, St. Louis, Mo., to V. V. Lebedjeff Engineering & Supply Company, dated 2/3/12.

73 Q. 46. With the exception of the copy of your letter of January 25, 1912, where did you get the other papers as to this correspondence, etc., which you have?

A. They were all handed to me by Mr. M. C. Fairchild of the V. V. Lebedjeff Company with the exception of a rough copy of order dated January 31, 1912. This Mr. Fairchild and Mr. Lebedjeff permitted me to copy from their order book.

The above correspondence as to the Lebedjeff transaction have been placed on the record and Mr. Cahall's letter of January 25, 1912, are offered in evidence and it is stipulated that the same be offered with the same force and effect as originals though only copies appear, subject to timely objection and correction.

It is stipulated that in the New York City directory for 1911 and 1912 the name "The Ludlow-Saylor Wire Company, 30 Church Street" appeared, and in the New York classified telephone directory of July, 1912, issue the following appears "Cortlandt 2670, The Ludlow-Saylor Wire Co., 30 Church."

Counsel for complainant offers in evidence copy of the trade journal or magazine known as Mining and Engineering World under date of March 9, 1912, wherein at page 13 an advertisement of the Ludlow-Saylor Wire Company appears and the same is marked "Complainant's Exhibit Copy of Mining and Engineering World." Also pages 47 and 48 of the Mining and Scientific Press wherein on page 48 an advertisement of The Ludlow-Saylor Wire

74 Company appears, and the same is marked "Complainant's Exhibit, Mining and Scientific Press."

Q. 47. Does the W. S. Tyler Company keep any stock of wire cloth or screens in New York?

Object to that question as irrelevant.

A. No.

Q. 48. Why not?

Object to that question as irrelevant and immaterial.

A. It is almost impossible to carry stock to meet the great variance in widths, meshes, size of wires, etc., which may be of an infinite variety of specifications. For this reason all of our orders are filled

from our factory in Cleveland, and most of them made up after the orders have been received.

Direct-examination closed.
No cross-examination.

Fairchild Deposition.

(Stipulated.)

It is stipulated between counsel that if Mr. M. C. Fairchild were called he would testify that he is purchasing agent of the V. V. Lebedieff Engineering & Supply Company, that in January, 1912, he received from W. P. Cahall, Eastern representative of the W. S. Tyler Company, the sample of screen produced by Cahall and marked "Complainant's Exhibit, Separated Piece of screen
75 given to Lebedieff Company," that he took this piece from a larger piece also produced by Mr. Cahall and marked "Ton-Cap Screen from which the small piece was given to the Lebedieff Company." That he ordered from the Ludlow-Saylor Wire Company, 30 Church Street, New York, thirty pieces of wire cloth like "Complainant's Exhibit, Separated piece of Screen, etc." above referred to, sending such separated piece with his order. That the goods which he ordered were shipped to the Lebedieff Company from the Ludlow-Saylor factory (at St. Louis, Mo.) as per his order, that he paid for same by check sent to Ludlow-Saylor Wire Company, 30 Church Street, New York. That he was informed by the express company of the receipt of the goods and that at the request of Mr. Cahall he had them sent directly from the express company to the W. S. Tyler Company, 11 Broadway, New York, and that the correspondence, invoice, order, etc., offered in evidence by Mr. Cahall were received by the Lebedieff Company and given to Cahall by Fairchild.

Counsel for complainant offers in evidence United States Letters Patent No. 966,599 granted on August 9, 1910, to Morlay P. Reynolds of Cleveland, Ohio assignor to the W. S. Tyler Company of Cleveland, Ohio for woven wire fabric for screens which is the patent in suit and the same is marked "Complainant's Exhibit, Reynold's Patent."

76 *Workman Deposition.*

HENRY C. WORKMAN, a witness called on behalf of complainant, testified as follows:

I am 42 years of age, reside at Briarcliff Manor, New York and am a patent expert and patent solicitor.

Stipulated between counsel that Mr. Workman is qualified to testify as an expert.

I have read the patent in suit, Reynolds Patent No. 966,599 of August 9, 1910 and believe I understand the same. I have seen the

sample of wire screens marked "Complainant's Exhibit, Sample of Rek-Tang Screen received through Lebedjeff Company" and have examined the same and compared it with the screen described in the patent in suit.

The patent referred to No. 966,599 patented August 9, 1910 to M. P. Reynolds is, as the title states, for a woven wire fabric for screens. This fabric, according to the specification of the patent is formed of warp and weft wires which are woven together, preferably to form a fabric having an oblong mesh as indicated in the drawings; and it is stated, as at lines 14 and 15, page 1 of the specification, that the fabric is particularly adapted for screening purposes. The warp wires or the wires running longitudinally of the fabric are indicated on the drawing by the numerals 1, 2, 3, 4, etc. The weft or transverse wires are indicated on the drawing by the reference letters *a*, *b*, *c* and *d*. These weft wires are described in the patent as being larger in cross-section than the warp wires, and also as made of softer metal than the warp wires. The fabric formed by weaving the warp and the weft wires is pressed
77 or rolled, and as a result of this operation the weft wires are bent or pressed by the warp wires where the latter cross the weft wires so as to form seats which are indicated on the drawings by the reference letters *a'* *b'* *c* and *d*, in which seats the warp wires lie. Lines 51 to 65 of the specification (page 1) describe this feature. The advantage of this construction is explained by the inventor as resulting in a firm interlocking of the two sets of wires at their intersections and any tendency of the chute or weft wires to move relatively to each other is practically eliminated and a screening fabric produced in which the meshes remain uniform in shape and size and will not vary in these particulars as frequently occurs in the case of screening fabrics heretofore in common use. (See lines 4 to 17, page 2.) Further advantages of this feature of construction of fabrics, with weft wires softer than the warp wires, are set out by the inventor, such as the better withstanding of vibration and the prevention of the liability of the weft wires to crystallize or break in the rolling or pressing operation.

The interlocking feature is also again referred to as a feature of advantage in an oblong mesh screen in which the weft wires are necessarily fewer in number than the warp wires and spaced farther apart, as such interlocking, due to the softer character of the weft wires, maintains such wires in their proper spaced relation. I note further that, as to the larger size of the weft wires described by the patentee, it is pointed out in the patent that a greater capacity of screen is obtained since the warp wires are farther apart where they cross the weft wires than at the central point of the
78 mesh, and that this results in screens which do not become clogged. It is also apparent that the warp wires being harder than the weft wires are better able to stand the wear and abrasion than if they were of softer metal like the weft wires.

I find these several features I have referred to set out in the claims of the patent. Claim 1, which reads as follows:

"A metallic pressed or rolled fabric for a screen, comprising warp wires and weft wires, the weft wires being larger and being formed

of softer metal than the warp wires and the warp wires being pressed into the weft wires and thereby interlocked therewith."

specifies a metallic pressed or rolled fabric for a screen with the weft wires larger and formed of softer metal than the warp wires, the latter being pressed into the weft wires and thereby interlocked therewith.

Claim 2 is like claim 1, except that it omits the feature of the weft wires being larger and specifies only that they are of softer metal than the warp wires. In other respects the claims are identical.

Claim 3 reads as follows:

"A metallic unitary structure for a screen, comprising a pressed or rolled fabric embodying warp wires and weft wires, the weft wires being softer and spaced farther apart than the warp wires so as to produce an oblong mesh in the screen and the warp wires being pressed into the weft wires and thereby interlocked therewith."

79 This claim is like claim 4, the only difference between claims 3 and 4 being that in claim 3 the weft wires are of softer metal than the warp wires, whereas in claim 4 the weft wires are specified as being both larger and of softer metal than the warp wires. With this difference between these two claims both said claims specify a metallic unitary structure for a screen comprising a pressed or rolled fabric embodying warp and weft wires, the weft wires being spaced farther apart then the warp wires so as to produce an oblong mesh.

I have examined the sample of wire screen marked "Complainant's Exhibit, Sample of Rek-Tang Screen received through the Lebedieff Company" and have compared it with the patent in suit and with each claim thereof; and I find that it is practically an exact copy of the invention described and claimed in this patent. This sample corresponds to the screen specified in claim 1 of the patent in that it is a metallic pressed or rolled fabric, the flattening of the warp and weft wires where they cross indicating this pressing operation. The weft or transverse wires of this sample are, as specified in claim 1, larger than the warp wires, and, as I found by testing, are of softer metal than the warp wires. And the warp wires are pressed into the weft wires and thereby interlocked therewith.

In the same way I find the features specified in the second claim of the patent embodied in the sample referred to. As this claim, as I have pointed out, is the same as claim 1, except that it omits the specification of the weft wires as being larger than the warp wires it is not necessary for me to again point them out.

80 I also find the several features specified in claims 3 and 4 of the patent embodied in this sample. The only features I need refer to particularly in connection with these two claims in their comparison with the sample is the spacing farther apart of the weft wires, since in other respects these claims are similar to claims 1 and 2. It is obvious from an inspection of the sample that the weft or transverse wires are spaced considerably farther apart than the warp wires and produce an oblong mesh.

I, therefore, find as a result of a reading of the claims and a comparison of the sample referred to with the several claims of the patent that the sample embodies all the several features of each of said claims and as specified in each of said claims.

Direct-examination closed.
No cross-examination.
Complainant's testimony in chief closed.
No testimony on behalf of defendant.

(Here follow drawings marked pages 80½, 81–84.)

CHARTS

TOO

LARGE

FOR

FILMING

85 United States Patent Office.

Morley P. Reynolds, of Cleveland, Ohio, Assignor to the W. S. Tyler Company, of Cleveland, Ohio, a Corporation of Ohio.

Woven-Wire Fabric for Screens.

Specification of Letters Patent.

Application filed May 27, 1907. Serial No. 375,941.

Patented Aug. 9, 1910.

966,599.

To all whom it may concern:

Be it known that I, Morley P. Reynolds, a citizen of the United States of America, residing at Cleveland, in the county of Cuyahoga and State of Ohio, have invented certain new and useful Improvements in Woven-Wire Fabrics for Screens; and I hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it pertains to make and use the same.

This invention relates to new and useful improvements in metallic fabric particularly adapted for screening purposes.

The object of my invention is to produce a metallic slot screen which will have a comparatively smooth plane surface, and will be constructed to withstand abrasion of particles coming in contact with the same, as well as one with greater discharging surface or air space than other screens heretofore produced, thus making it possible to pass a relatively larger tonnage of particles through the same.

My invention consists in the matter substantially as hereinafter claimed.

I shall now describe my invention so that others skilled in the art to which it appertains may manufacture and use the same, reference being had to the accompanying drawing, forming part of this specification, in which—

Figure 1 is a view of a wire fabric embodying my invention. Fig. 2 is a section on the line 2—2 of Fig. 1. Fig. 3 is a section on the line 3—3 of Fig. 1. Fig. 4 is a section on the line 4—4 of Fig. 1.

Like symbols of reference indicate like parts in each of the several figures.

In the drawing, 1, 2, 3, 4, 5, 6, 7, and 8, represent the warp wires, which are preferably circular in cross-section, and *a*, *b*, *c*, and *d*, represent the chute or weft wires, which may be either circular or rectangular in cross-section and are shown as being considerably larger in cross-sectional area than the warp wires. The chute or weft wires are also made of a softer metal than the warp wires.

In forming my improved fabric the warp and the weft wires are preferably so woven together, as illustrated in the drawing, as to produce a fabric having an oblong mesh. The fabric thus woven is then pressed or rolled in order to bring the surfaces of the warp wires and the weft wires, where they cross one another, into substantially the same plane. During this pressing or rolling operation, as the chute wires are of softer metal than the warp wires, the chute wires will be bent or pressed by the pressure of the warp wires, where they cross the chute wires, so as to form seats, as at *a'*, *b'*, *c'*, and *d'*, in which seats the warp wires lie. The surface of the fabric where the wires cross one another will then be in substantially the same plane, but neither the warp wires nor the chute wires will be flattened to any great extent, and each of the warp wires will maintain the crimped or undulating form which was imparted to it during the weaving operation. Therefore the portion of each warp wire between any pair of chute wires will be inclined in the opposite direction to the adjoining portion of each warp wire at each side thereof. To illustrate, assuming that the screen is lying in a horizontal position, and taking for consideration the portions of the wires 2 and 3 lying between the chute wires *a* and *b*;—it will be seen that where the wires 2 and 3 cross the chute wire *a* the wire 2 is underneath the chute wire *a* and the wire 3 is above the same. The wire 2 then inclines upwardly and passes over the chute wire *b* while the wire 3 inclines downwardly and passes underneath the chute wire *b*, so that where the wires 2 and 3 cross the wire *a* the wire 3 is above the wire 2, while the central portions of said wires 2 and 3 between said chute wires *a* and *b* are in the same horizontal plane. Now if the distance between the said portions of the wires 2 and 3 at their central points between the wires *a* and *b* and the distance between them where they cross either of the chute wires *a* or *b* be measured, it will be found that said wires 2 and 3 are farther apart where they cross the chute wires *a* and *b* than they are at their said central points, and although the difference is comparatively slight it can be positively observed. In this way I produce a metallic wire fabric in which each mesh or opening has a greater capacity at its ends than at its center, and in actual use I have found this to be a most valuable feature, a-
86 screens constructed of such a fabric do not become clogged and are free from other objections common to ordinary screens.

Another advantage of my invention lies in this that by reason of the pressing or rolling operation to which the woven fabric is subjected and of the fact that the chute or weft wires are of softer metal than the warp wires the two sets of wires are firmly interlocked with each other at their intersections, and any tendency of the chute wires to move relatively to each other is practically eliminated, and a screening fabric is produced in which the meshes will remain uniform in shape and size and will not vary in these particulars as frequently occurs in the case of screening fabrics heretofore in common use. Also by forming the chute wires of softer metal than the warp wires the fabric will better withstand vibration

and the chute wires the extreme bending to which they are subjected in the crimping over and under the hard warp wires. Hard chute wires crimped and compacted or pressed or rolled in the manner described would crystallize and be very liable to break easily owing to their lack of ductility. It will be understood, of course, that the difference in the hardness between the chute and the warp wires will naturally depend upon the service to which the screening fabric is to be put. In some screens the difference will be quite marked; in others not so great. The chute wires are also preferably made larger than the warp wires for the purpose of strengthening the screen, as there are fewer chute wires than warp wires and also being softer than the warp wires they are more liable to wear and abrasion and hence should be larger to withstand the wear equally with the warp wires. In the oblong mesh screen it is necessary to have the weft wires interlocked with the warp wires to positively maintain such wires in their proper spaced relation with each other.

I claim:—

1. A metallic pressed or rolled fabric for a screen, comprising warp wires and weft wires, the weft wires being larger and being formed of softer metal than the warp wires and the warp wires being pressed into the weft wires and thereby interlocked therewith.

2. A metallic pressed or rolled fabric for a screen, comprising warp wires and weft wires, the weft wires being formed of softer metal than the warp wires and the warp wires being pressed into the weft wires and thereby interlocked therewith.

3. A metallic unitary structure for a screen, comprising a pressed or rolled fabric embodying warp wires and weft wires, the weft wires being softer and spaced farther apart than the warp wires so as to produce an oblong mesh in the screen and the warp wires being pressed into the weft wires and thereby interlocked therewith.

4. A metallic unitary structure for a screen comprising a pressed or rolled fabric embodying warp wires and weft wires, the weft wires being larger and of softer metal and spaced farther apart than the warp wires so as to produce an oblong mesh in the screen and the warp wires being pressed into the weft wires and thereby interlocked therewith.

In testimony whereof, I sign the foregoing specification, in the presence of two witnesses.

MORLEY P. REYNOLDS.

Witnesses:
VICTOR C. LYNCH.
B. C. BROWN.

87 *Stipulation Settling Record.*

It is stipulated that the foregoing record contains all the evidence taken in this action and that the same be incorporated into the transcript on appeal.

New York, September 24, 1913.

D. ANTHONY USINA,
Solicitor for Complainant.
AUGUSTUS N. HAND,
Solitilor for Defendant, Who, However, Appears Specially to Object to the Right of This Cause to be Heard upon the Appeal Which the Complainant Has Attempted to Take.

Order Settling Record.

On the above stipulation the foregoing statement of the evidence is approved and it is

Ordered, that the same be incorporated into the transcript of record on appeal.

New York, September 25, 1913.

C. M. HOUGH, *Judge.*

(Filed, Sept. 29, 1913.)

88 *Memorandum.*

United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

On the evidence I am of the opinion that the defendant has sustained the allegations of the plea that the defendant did not have a regular and established place of business in this District.

The sale to Lebedjeff Company was accepted at St. Louis and the goods were shipped from there. On the facts, I am satisfied that the sale was a Missouri sale, and, consequently, that an act of infringment was not committed within the Southern District of New York.

Upon these conclusions as to the facts, the law of the case is to be found in Judge Lacombe's opinion (C. R. XXXI).

I think that under the new Equity Rules defendant is entitled to the dismissal of the bill.

July 8, 1913.

J. M. MAYER,
District Judge.

Settle decree on five days' notice.

D. J.

89 *Final Decree.*

At a Stated Term of the United States District Court Held at the United States Post-Office on the 6th Day of August, 1913.

Present: Hon. Julius M. Mayer, United States District Judge.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
against
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

This cause came on to be heard on Bill of Complaint for infringement of Patent, plea to the jurisdiction and proofs, at this term, and was argued by J. Negley Cooke, of Counsel for the complainant, and James P. Dawson, of Counsel for the defendant, and thereupon upon consideration thereof, and on motion of Augustus N. Hand, Solicitor for the defendant herein (appearing specially for the purpose of objecting to the jurisdiction of the Court and moving to dismiss the Bill of Complaint) it was

Ordered, Adjudged and Decreed as follows, viz:

That the defendant, Ludlow-Saylor Wire Company has had no regular and established office and place of business within the Southern District of New York:

The complainant has failed to show a sale of defendant's goods within the Southern District of New York:

90 That the sale to Lebedjeff Company by the defendant was made in the City of St. Louis, Missouri, and the goods were shipped from there, and the said sale was a Missouri sale and was not made within the Southern District of New York:

That the defendant has committed no act of infringement of complainant's alleged patent within the Southern District of New York: And it was further

Ordered, Adjudged and Decreed That complainant's bill herein be dismissed for lack of jurisdiction of this Court.

(Sg.) JULIUS M. MAYER,
United States Judge.

Approved as to form:

D. ANTHONY USINA,
Solicitor for Complainant.

AUGUSTUS N. HAND,
Solicitor for Defendant, Appearing Specially for for the Purpose of Objecting to the Jurisdiction.

Petition for Appeal.

United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The above named Complainant, conceiving itself aggrieved by the order and decree made and entered herein on the 6th day of August, 1913, hereby appeals from said order and decree
91 to the United States Circuit Court of Appeals for the Second Circuit and file- herewith its assignment of errors, and Complainant prays that this appeal be allowed and that a transcript of the record of proceedings upon which said decree was based, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit.

D. ANTHONY USINA,
Solicitor for Complainant.

The appeal above prayed is hereby allowed.

JULIUS MAYER.

Assignment of Errors.

United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

And now comes the complainant by its solicitor and says that in the record and proceedings, order and decree of this Court there is manifest error in this, to wit:

First: The Court erred in dismissing the bill of complaint for lack of jurisdiction.

Second: The Court erred in holding that the Defendant has sustained the allegations of its plea that it did not have a regular and established place of business in the Southern District of New York;

92 Third: The Court erred in holding that the sale of goods by the Defendant to the Lebedjeff Company was accepted at St. Louis;

Fourth: The Court erred in holding that the sale by Defendant to the Lebedjeff Company was a Missouri sale;

Fifth: The Court erred in holding that an act of infringement was not committed within the Southern District of New York;

Sixth: The Court erred in applying to this case the law of Judge Lacombe's opinion in the Westinghouse Electric Company vs. Stanley Electric Company, 116 Fed. Rep., 641;

Seventh: The Court erred in not entering a decree in favor of Complainant in accordance with the prayer of the bill.

D. ANTHONY USINA,
Solicitor for Complainant.

Bond for Damages and Costs.

District Court of the United States of America for the Southern District of New York in the Second Circuit.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Plaintiff,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Know all Men by these Presents, That the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York,
93 County and State of New York, is held and firmly bound unto the above named W. S. Tyler Company in the sum of Two Hundred and Fifty ($250.00) dollars, to be paid to the said W. S. Tyler Company for the payment of which, well and truly to be made, it binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with its seal, and dated the 2nd day of October, 1913.

Whereas, the above named Ludlow-Saylor Wire Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the decree dated the 6th day of August, 1913, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Defendant shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By ALONZO GORE OAKLEY,
Attorney-in-Fact.

Attest:

S. FRANK HEDGES,
Attorney-in-Fact.

STATE AND COUNTY OF NEW YORK, *ss*:

On this 2nd day of October, 1913, before me personally came Alonzo Gore Oakley known to me to be the Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Ludlow-
94 Saylor Wire Company as surety thereon, who being by me duly sworn, deposes and says, that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Ludlow-Saylor Wire Company is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that he is acquainted with S. Frank Hedges and knows him to be the Attorney-in-fact of said Company; and that the signature of said S. Frank Hedges subscribed to said bond is in the genuine handwriting of said S. Frank Hedges and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

ALONZO GORE OAKLEY.

Sworn to, acknowledged before me, and subscribed in my presence this 2nd day of October, 1913.

C. D. MARSAC,
Notary Public, New York County.

95 *Citation.*

United States District Court, Southern District of New York.

In Equity. 9–101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

By the Honorable District Judge in and for the District Court of the United States for the Southern District of New York, within the Second Circuit.

To Ludlow-Saylor Wire Company:

Whereas, W. S. Tyler Company has lately appealed to the United States Circuit Court of Appeals for the Second Circuit from a decree

entered in the District Court of the United States for the Southern District of New York, made in favor of you, the said Ludlow-Saylor Wire Company, and has filed the security required by law: You are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals for the Second Circuit at the City of New York, on the 31st day of October next, to do in the matter of said appeal what may remain to justice to be done in the premises.

Given under my hand at the City of New York in the Southern District of New York, in the Second Circuit, the 4th day of October, in the year of our Lord one thousand nine hundred and thirteen.

Dated, New York, October 4th, 1913.

GEO. C. HOLT,
District Judge.

96 *Stipulation as to True Transcript of Record.*

United States District Court, Southern District of New York.

In Equity. 9–101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, September 29, 1913.

D. ANTHONY USINA,
Attorney for Complainant.
AUGUSTUS N. HAND,
Attorney for Defendant, Who, However, Appears Specially to Object to the Jurisdiction of this Court and the Right of this Cause to be Heard upon the Appeal Which the Complainant has Attempted to Take.

97 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

In Equity. 9–101.

W. S. TYLER COMPANY
vs.
LUDLOW-SAYLOR WIRE COMPANY.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York,

do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 6th day of October in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-eighth.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

98 United States Circuit Court of Appeals for the Second Circuit, October Term, 1913.

No. 190.

THE W. S. TYLER COMPANY, Complainant-Appellant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant-Appellee.

Appeals from the District Court of the United States for the Southern District of New York.

Argued February 11, 1914; Decided March 13, 1914.

Before Coxe, Ward, and Rogers, Circuit Judges.

On Appeal from the District Court of the United States for the Southern District of New York.

Per Curiam:

The District Court sustained the pleas to the jurisdiction as to the causes of action based on trademark and unfair competition, but allowed a replication to be filed to the plea in respect to the cause of action on infringement. This was the proper practice under old rule in equity 33 then in force. The issue on the plea was tried and the Court sustained the plea and dismissed the bill. This is the proper practice under new rule 29. From that decree an appeal was taken to this court, but it should have been taken to the Su-
99 preme Court. See Secs. 128 and 238 of the Judicial Code. Mechanical Appliance Co. vs. Castleman, 215 U. S. 437, and Herndon Co. vs. Norris & Co., 224 U. S., 496.

The appeal is dismissed.

C. C. Linthicum, for the Appellant.
A. N. Hand, for the Appellee.

100 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court-rooms in the Post-office Building in the City of New York, on the 20th Day of March, One Thousand Nine Hundred and Fourteen.

Present: Hon. Alfred G. Coxe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

W. S. TYLER COMPANY, Complainant-Appellant,
vs.
LUDLOW-SAYLOR WIRE COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the tran-cript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the appeal from said District Court be and it hereby is dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. C. C.
H. W. R.

101 Endorsed: United States Circuit Court of Appeals, Second Circuit. Tyler Co. vs. Ludlow-Saylor Co. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Mar. 24, 1914. William Parkin, Clerk.

102 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 101 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of W. S. Tyler Company against Ludlow-Saylor Wire Company, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of April in the year of our Lord One Thousand Nine Hundred and fourteen and of the Independence of the said United States the One Hundred and thirty-eighth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

IN THE

United States Supreme Court

OCTOBER TERM, 1914

W. S. TYLER COMPANY,
Petitioner,

vs.

LUDLOW-SAYLOR WIRE COMPANY,
Respondent.

Petition for Certiorari

Your petitioner, W. S. Tyler Company, represents that it is a corporation of the State of Ohio; that Ludlow-Saylor Wire Company, the respondent named herein, is a corporation of the State of Missouri; that on or about the 1st day of April, 1912 your petitioner filed a bill in equity in the District (then Circuit) Court of the United States for the Southern District of New York charging the respondent *inter alia* with the infringement of certain Letters Patent by the sale of certain screens of certain materials described in said bill and covered by the Letters Patent therein sued on, said bill alleging and charging that the defendant therein had a regular and established place of business within the Southern District of New York and had committed said acts of infringment within said District. Thereafter pleas were filed denying the jurisdiction of the Court on the ground that defendant had no established place of business and had committed no acts of infringement within said District and upon issue being made and proof taken as to the

facts set forth in said pleas a hearing was had thereon and the Court on, to wit, August 5th, 1913, entered a decree sustaining said pleas and dismissing said bill for want of jurisdiction. That thereupon an appeal was taken to the Court of Appeals for the Second Judicial Circuit which appeal came on to be heard at the February session 1914, of the said Court of Appeals and said Court on, to wit, March 12, 1914, dismissed said appeal on the ground that the said Court had no jurisdiction thereof and that the appeal therein should have been taken to this Court. Copies of the opinions of the Judge of the District Court and of the Court of Appeals in said proceedings are appended hereto.

Your petitioner in accordance with the decision of the Court of Appeals in said opinion has prayed an appeal to this Court, but your petitioner believing that the decision of said Court is erroneous prays this Honorable Court to require that the record and proceedings in said Circuit Court of Appeals for the Second Judicial Circuit be sent up to this Court to the end that said decision and the decree and mandate of said Court may be considered and if this Court should decide that said appeal was properly taken that it may require said Circuit Court of Appeals to reinstate said appeal and decide said case upon its merits.

And your petitioner will ever pray.

Dated, September 10, 1914.

W. S. TYLER COMPANY,
Petitioner,
By D. Anthony Usina,
Solicitor.
J. N. Cooke,
C. C. Linthicum,
Counsel.

State of New York,
County of New York. } ss:

D. Anthony Usina, makes solemn oath and says that he is solicitor for the above named petitioner, W. S. Tyler Company, that the foregoing petition is in his opinion well founded in point of law, is not interposed for delay and is true in point of fact.

D. ANTHONY USINA.

Subscribed and sworn to before me
this 10th day of Sept., 1914.
Lulu Stubenvoll.

Points in Support of Petition for Writ of Certiorari

(1) Section 6 of the Act of March 3, 1891 establishing Circuit Courts of Appeal made the decision of said Courts final (subject to review by this Court on writ of certiorari and certificate) "in all cases arising under the patent laws".

The Act of March 3, 1897 (Stat. 695) provided

> "That in suits brought for infringement of Letters Patent the Circuit Courts of the United States shall have jurisdiction in law or in equity, in the district which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement, and have a regular and established place of business."

Section 5 of the Act of March, 1891 provided that appeals or writs of error may be taken from

the District Court or from the existing District Courts direct to the Supreme Courts in the following case:

> "In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

We understand this Court to have decided that this provision related solely to the jurisdiction of the Court *as a Federal Court* and not to the question of jurisdiction as between the Federal Courts of different Districts. Cases in which this act has been construed are *Excelsior Wooden Pipe Co. vs. Pacific Bridge Co.*, 185 U. S., 282; *Louisville Trust Company vs. Knott*, 191 U. S., 233; *Foreriver Shipbuilding Co., vs. Haag*, 219 U. S. 175; *United States vs. Jahn*, 155 U. S., 109; *Heardon Carter Co. vs. Norris & Co.*, 224 U. S., 496.

(2) The jurisdiction of the Federal Court is exclusive in patent cases, the jurisdiction of the Court of Appeals is made final in such cases, subject to review by this Court, and appeals from the District Courts in patent cases to the Court of Appeals involve necessarily other questions, to wit, the validity of the patent, its infringement, and therefore such cases are not within the provision of Section 5 of the Court of Appeals Act of March, 1891.

We understand that the distinction has been made and preserved as to questions of jurisdiction between the State Courts and the Federal Courts and the jurisdiction of the various Federal District Courts. See *Excelsior Wooden Pipe Co. vs. Pacific Bridge Co.*, 185 U. S., 282; *Louisville Trust Company vs. Knott*, 191 U. S., 233; *Foreriver Shipbuilding Co. vs. Haag*

219, U. S., 175; *United States vs. Jahn*, 155 U. S., 109; *Heardon Carter Co. vs. Norris & Co.*, 224 U. S., 496.

(3) Whether a given subject falls within the jurisdiction of the State or the Federal Courts is fundamental; it may be raised by either party at any stage of the proceedings or by the Court *sua sponte*. Its ultimate decision in keeping with its importance rests with this Court.

(4) The jurisdiction of one District Court or another is a question of jurisdiction over the person of the defendant, and has nothing to do with the character of the controversy, as is evidenced by the fact that the defendant by a general appearance can waive this defense (even though he has not done so in the present case).

(5) A comparison between Section 5 of the Act of 1891 providing that an appeal should be taken

Conclusion

If Petitioner is correct in assuming that the Court of Appeals was in error in dismissing the appeal for want of jurisdiction it follows that the appeal which Petitioner has taken to this Court must be dismissed. Therefore, your Petitioner prays that this writ of certiorari may be granted to bring up the proceedings in said Circuit Court of Appeals to this Court for its determination to the end that this Court may direct said Circuit Court of Appeals to reinstate said appeal and to determine the same upon its merits.

Respectfully submitted,

Dated, September 10, 1914.

D. ANTHONY USINA,
Solicitor for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1914

W. S. TYLER COMPANY,
Petitioner,

vs.

LUDLOW-SAYLOR WIRE COMPANY,
Respondent.

Notice of Petition for Certiorari

PLEASE TAKE NOTICE, that on Monday, October 12th, 1914, at the opening of the Court or as soon thereafter as counsel can be heard we will present the attached petition and brief before the Supreme Court of the United States.

Dated, September 10th, 1914.

D. ANTHONY USINA,
Solicitor for Petitioner.

Affidavit

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1914

W. S. TYLER COMPANY,
Petitioner,
vs.
LUDLOW-SAYLOR WIRE COMPANY,
Respondent.

State of New York,)
County of New York.) ss:

William X. Seewagen, being duly sworn, deposes and says that on September 10, 1914, at noon, he served the attached Notice of Petition for Certiorari, Petition for Certiorari, and Points in Support of Petition for Writ of Certiorari, upon Augustus N. Hand, Solicitor for Respondent, by leaving a copy of the same with the person in charge of his office.

WILLIAM X. SEEWAGEN.

Sworn to and subscribed before me this
11th day of September, 1914.
Lulu Stubenvoll,
Notary Public.
(Seal)

Memorandum

(Copy)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

W. S. TYLER COMPANY,
Complainant,
vs.
LUDLOW-SAYLOR WIRE COMPANY,
Defendant.

On the evidence I am of the opinion that the defendant has sustained the allegations of the plea that the defendant did not have a regular and established place of business in this District.

The sale to Lebedjeff Company was accepted at St. Louis and the goods were shipped from there. On the facts, I am satisfied that the sale was a Missouri sale and, consequently, that an act of infringement was not committed within the Southern District of New York.

Upon these conclusions as to the facts, the law of the case is to be found in Judge Lacombe's opinion (C. R. XXXI).

I think that under the new Equity Rules defendant is entitled to the dismissal of the bill.

July 8, 1913.

J. M. MAYER,
District Judge.

Settle decree on five days' notice.

D. J.

Decision

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE W. S. TYLER COMPANY,
Complainant-Appellant,
against
THE LUDLOW-SAYLOR WIRE COMPANY,
Defendant-Appellee.

Before: COXE, WARD and ROGERS,
Circuit Judges.

On appeal from the District Court of the United States for the Southern District of New York.

PER CURIAM:

The District Court sustained the pleas to the jurisdiction as to the causes of action based on trade-mark and unfair competition, but allowed a replication to be filed to the plea in respect to the cause of action on infringement. This was the proper practice under old rule in Equity 33 then in force. The isue on the plea was tried and the Court sustained the plea and dismissed the bill. This is the proper practice under the new Rule 29. From that decree an appeal was taken to this Court, but it should have been taken to the Supreme Court. See Secs. 128 and 238 of the Judicial Code. Mechanical Appliance Co. v. Castleman, 215 U. S., 437 and Herndon Co. v. Norris & Co., 224 U. S., 496.

The appeal is dismissed.

Entered:

March 12, 1914.

~~No. 441~~

IN THE

Supreme Court of the United States,

OCTOBER TERM 1914.

No. 622

THE W. S. TYLER COMPANY, PETITIONER,
vs.
LUDLOW-SAYLOR WIRE COMPANY, RESPONDENT.

Application for Certiorari to the Circuit Court of Appeals of the Second Circuit—

Brief of Respondent in Opposition to the Granting of the Writ.

JAS. P. DAWSON,
Solicitor for Respondent.

IN THE

Supreme Court of the United States,

OCTOBER TERM 1914.

No.....

THE W. S. TYLER COMPANY, PETITIONER,

vs.

LUDLOW-SAYLOR WIRE COMPANY, RESPONDENT.

STATEMENT.

An appeal in this cause from a ruling of the District Court of the United States for the Southern District of New York sustaining a plea to the jurisdiction (filed before the recent revision of the rules) and dismissing the bill for want of jurisdiction, is pending in this Court, being No. 1010 on the docket thereof.

The undersigned entered his appearance therein as sole counsel of record for the Ludlow-Saylor Wire Company, defendant-appellee, on the 15th day of June, 1914.

An appeal from such decree of the District Court was first taken by the appellant to the Circuit Court of Appeals for the Second Circuit, where the appeal was dismissed upon the ground that inasmuch as the sole question involved was the jurisdiction of the District Court, the appeal should have been taken to this Court.

Thereafter the complainant perfected its appeal to this Court.

No notice of the presentation of a petition to this Court for *certiorari* to bring up the record of the Circuit Court of Appeals for the Second Circuit for review by this Court, and no copy of any petition for *certiorari* and no brief or other

paper of any description has been served on the undersigned, sole counsel of record in the cause, as required by the third paragraph of Rule 37 of this Court.

The only notice the undersigned has had of any intention on the part of the appellant to apply to this Court for a writ of *certiorari* is the information received from Augustus N. Hand, Esq., who was associated with the undersigned as counsel for the Ludlow-Saylor Wire Company, the defendant-appellee in the Circuit Court of Appeals for the Second Circuit, but who has not entered his appearance in this Court, that certain papers had been served upon him by the appellant, purporting to be a "Notice" "Petition for writ of Certiorari" and "Points in Support of Petition for Certiorari" and "Notice of Motion to advance hearing on Appeal" which papers he transmitted to the undersigned and which the undersigned has transmitted to the Clerk of this Court accompanying this statement and brief for the information of the Court.

Inasmuch as he has received no notice and no copy of any petition for *certiorari* or brief, counsel is unwilling to believe that any application for certiorari will be made to this Court pursuant to the papers served on Mr. Hand, but would rather believe under the circumstances, that the intention to present such application has been abandoned. Out of abundant precaution however counsel has transmitted this brief to the Clerk to be noticed by the Court only in the event that such application is made and entertained by the Court, and to avoid any possibility of being in default. Rule 37 of this Court requires that the brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition and it is impossible for counsel to know whether the application will be presented or not, until after the time fixed by the rule for the filing of his brief, if he is to file any brief.

In the event that the "petition" served on Mr. Hand and the "Points" in support thereof are presented and entertained by the Court, counsel for respondent desires to submit the following in opposition to the granting of the writ:

POINTS.

I.

The paper entitled "Petition for Certiorari" served upon Mr. Hand, is insufficient, in that "a certified copy of the entire transcript of record of the case, including the proceedings in the Court to which the writ of certiorari is asked to be directed" is not made an exhibit to the petition, as required by the third paragraph of Rule 37 of this Court. The only papers attached or referred to in the petition are the opinions of the Judge of the District Court and of the Circuit Court of Appeals.

II.

No notice of the date of submission of the petition and no copy of the petition and brief in support of the application have been served on counsel for respondent as required by paragraph three of rule 37 of this Court.

III.

The sole questions before the Circuit Court of Appeals were (1) had the District Court jurisdiction of the cause; and (2) did the Circuit Court of Appeals have jurisdiction of the appeal.

In determining that it had not, the Circuit Court of Appeals followed the rule established by repeated decisions of this Court.

United States vs. Jahn, 155 U. S. 109;
Mechanical Appliance Co. vs. Castleman, 215 U. S. 437;
Herndon-Carter Co. vs. Norris & Co. 224 U. S. l. c. 498.

IV.

The whole argument of the petitioner as set forth in the paper served on Mr. Hand, entitled "Points in Support of Petition for Writ of Certiorari" seems to be based upon the following premises, namely:

That the statutes governing the right of appeal in this case are sections 5 and 6 of the Act of March 3, 1891, and the Act of March 3, 1897, and that the statute of 1897 being later in date than the general statute of 1891 created an exception to the general statute of 1891. But these premises are false, and consequently the conclusion sought to be drawn from them, falls to the ground. Neither the Act of March 3, 1891, nor the Act of March 3, 1897, were in force at the time of the ruling by the Circuit Court of Appeals or the time of the ruling by the District Court both having been superceded by

provisions of the Judicial Code. So that the argument predicated upon the fact that the one enactment was of a later date than the other, ceases to have any force. All of the statutory provisions which govern the right of appeal in this case are to be found in sections 48, 128 and 238 of the Judicial Code, and all came into effect together on January 1st, 1912.

V.

Petitioner is not entitled to certiorari in any case where it has a right of appeal. And its right of appeal to this Court being clear, its application for certiorari ought to be refused.

VI.

Since the ruling of the Circuit Court of Appeals for the Second Circuit, dismissing the appeal in this case, the petitioner has brought a suit on the same cause of action against the respondent in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, the place of residence of the respondent. An answer to the merits has been filed in that case and it is now at issue. No question is or can be raised to the jurisdiction of the District Court of the Eastern District of Missouri.

Since the petitioner can be given in the Missouri case all the relief which under any circumstances it could have received in this case the point sought to be decided by certiorari proceedings has ceased to be of any practical importance and has become a mere moot question.

All of which is respectfully submitted.

JAS. P. DAWSON,
Solicitor for Respondent.